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## Separating Contract and Promise

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*Aditi Bagchi*

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# SEPARATING CONTRACT AND PROMISE

ADITI BAGCHI\*

## ABSTRACT

*Contract has been conceptualized as a species of promise. This prevailing approach obscures essential differences between legally binding and everyday, or “private,” promises. The moral character of a private promise depends on the fact that it is not only freely made but also freely kept. Contractual promises are not intended to have and do not have this voluntary character.*

*In making a private promise, a promisor creates a sufficient reason to perform the content of her promise: the very fact of her promise. To the extent she simultaneously creates a second sufficient reason—liability in the case of breach—the first reason does no work, or there is no way to confirm the independent sufficiency of the first reason. Similarly, in the private practice of promise, the fact of promise is itself the ground for the promisee’s belief that the promisor will perform. To the extent the promisee is given independent assurance of performance, she cannot objectively rely on the fact of promise alone. The very act of contracting removes one from the moral world of private promise.*

*By better appreciating the difference between contract and private promise, we can better mark the appropriate domain of contract law. Where overlap with the domain of private promise is justified, as in the regulation of marriage, appreciating the tension between private and legal promise may help explain why the extension of contract has been difficult to achieve in practice. It also suggests that we can mitigate the conflict between private and legal promise by minimizing their overlap. This can be done by limiting the remedies for breach to ones that the private promise did not contemplate. In other contexts, the distinction between private and legal promise calls for the expansion of the domain of contract. For example, some promises made in the context of radical inequality in power, as in most employment circumstances, are located outside the law. To the extent we see the depersonalization of the employment relationship as an important achievement of the liberal market economy, the account here clarifies one task of contract law: the displacement of private promise in the realm of employment.*

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Contract has been conceptualized as a species of promise. Most famously, Charles Fried has argued that contracts should be enforced because they are promises.<sup>1</sup> More recently, Daniel Markovits has defended a theory of contract that takes contract to be a special case of

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1. See generally CHARLES FRIED, *CONTRACT AS PROMISE* (1981).

promise,<sup>2</sup> and Seana Shiffrin has suggested ways in which the obligations of contract and promise diverge, a problem only because those subject to contractual obligations are ostensibly also subject to the norms of promise.<sup>3</sup> As Shiffrin and others have pointed out, “U.S. contract law represents that a contract is an enforceable promise” and “[t]he language of promises, promisees, and promisors saturates contract law” and its surrounding literature.<sup>4</sup>

Treating contractual promise as a kind of promise highlights certain important aspects of contracting, including the communication of a commitment to future action and the delegation of partial authority over future conduct to another person. Contract and promise do not uniquely share those features; one might communicate a commitment to future action that is not intended to benefit the person to whom the commitment is communicated, and the communication might not amount to either contract or promise. Similarly, one might delegate authority over some future decision upward or downward without it amounting to either contract or promise. Contract and promise also differ in fundamental ways that I will explore in this Article. But it is clear that contract and promise on their faces seem to belong to some family, even if each simultaneously has equally close or closer relations with other kinds of acts.

Perhaps because of their familial relations, the similarities between contract and promise are too easily assumed and often over-emphasized. The result has been to obscure essential differences between legally binding and everyday, or what I will call “private,” promises. The moral character of a private promise depends on the fact that it is not only freely made but also freely kept. Most contractual promises are not intended to have and (by definition) do not have this voluntary character.<sup>5</sup>

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2. See Daniel Markovits, *Contract and Collaboration*, 113 YALE L.J. 1417, 1448 (2004) (arguing that “[c]ontract presents a special case of promise” and that contract is a “class of promises”).

3. See generally Seana Valentine Shiffrin, *The Divergence of Contract and Promise*, 120 HARV. L. REV. 708 (2007).

4. *Id.* at 721.

5. Dori Kimel has made a related point. He has suggested that the keeping of promises and reliance on promises communicates trust and that enforceability interferes with this expression.

By systematically creating powerful reasons to refrain in the first place from conduct which amounts to harming the other party, enforceability casts a thick and all-encompassing veil over parties' motives and attitudes towards each other, thus leaving reliance, performance, and other aspects of contractual conduct largely devoid of expressive content—the kind of expressive content that promissory conduct so typically possesses.

Dori Kimel, *Neutrality, Autonomy, and Freedom of Contract*, 21 OXFORD J. LEGAL STUD. 473, 491 (2001) [hereinafter Kimel, *Neutrality*]; see also DORI KIMEL, FROM PROMISE TO CONTRACT: TOWARDS A LIBERAL THEORY OF CONTRACT 29 (2005) [hereinafter KIMEL, PROMISE].

My goal in this Article is not to catalogue the various similarities and differences, as though to demarcate the fuzzy boundaries of the circle of contract as it is situated in a larger circle of promise. Nor do I purport to have discovered a logical incompatibility between contract and promise; indeed, I take for granted that contract is a species of promise. Rather, I will argue that, in an important sense, contract and *private* promise are in tension with one another. My aim is to demonstrate a natural tendency on the part of contract, when layered on promise, to undermine the value of private promise. The reasons for enforcing contract are sometimes taken to be derivative from the reasons to keep one's promise, or the reasons to support an institution of promise are taken to be reasons to support an institution of contract. Contractual obligation is then thought to reinforce promissory obligation. But private promises which are given the status of contract are not thereby elevated. A private promise marked as contractual actually loses (at least some of) its promissory quality. The reasons for keeping and relying upon a private promise are in part replaced, rather than merely augmented, by the reasons for keeping and relying upon a contract.

In most contracts, one of the two following scenarios is likely: In the first, the agreement between contractual promisor and contractual promisee is not taken to be an exchange of private promise, and thus the law readily recognizes it as a contract. In the second, because the agreement between the promisor and promisee is of a character that the law is reluctant to imbue with legal status, the parties must go out of their way to signal that theirs is a legal rather than a private affair. In both scenarios, the promisor essentially opts out of the private practice of promising when she assigns to a third party the authority to coerce performance of her promise. Similarly, the promisee essentially opts out of the practice of promising by demanding or accepting that what would otherwise be a private promise is instead converted to a legally binding commitment.

Why does contract begin where private promise ends? Because the objective reasons that apply to promisor and promisee are replaced once what was a promise is subject to legal intervention. In making a private promise, a promisor ordinarily creates a sufficient reason to perform the content of her promise: the very fact of her promise.<sup>6</sup> To

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6. The promise will not always be a sufficient reason. It can be overcome by other reasons, including reasons pertaining to the interests of third parties and, as discussed below, reasons relating to the interests of the promisor herself.

Characterizing the promise as a sufficient reason to perform does not imply that this exhaustively describes the proper structure of the promisor's reasoning; I will not attempt such an account here. I note, though, that the effect of the promise may also be to exclude certain other reasons, as argued by Joseph Raz. See JOSEPH RAZ, *PRACTICAL REASON AND NORMS* (1990); Joseph Raz, *Reasons for Action, Decisions and Norms*, 84 MIND 481, 492-94 (1975). For example, reasons that speak to whether the promisor has reason to do anything

the extent she simultaneously creates a second sufficient reason—liability in the case of breach—the first reason does no work, or there is no way for the independent sufficiency of the first reason to manifest itself objectively.

Similarly, when making a private promise, the promisor gives the promisee ground for belief that the promisor will perform: again, the fact of promise. To the extent the promisee is given independent assurance of performance, she cannot objectively rely on the fact of promise alone. Because private promises, but not all promises, are intended not only to assume obligation but to communicate the reordering of interests in which that obligation consists, it is important for the reasons created by private promise to do *observable* work for both promisor and promisee.

Some contractual promises coexist with private promises of the same content. But their coexistence is uneasy, because invoking the specter of the law undermines the moral commitment contained in a promise from the perspective of both promisor and promisee. The content of that commitment is possible only within a close personal relationship. It entails a combining of interests that were previously separately held by promisor and promisee. In a private promise, the promisor undertakes to give the promisee's relevant interests weight equal to or greater than her own. Contract, by contrast, turns on the separateness of these interests. The specter of legal liability creates a reason for performance that stems from the separateness rather than the unity of interests between promisor and promisee. A sincere intent on the part of the promisor to perform for reasons unrelated to legal obligation does not dissipate this tension any more than a sincere intent on the part of the more powerful party in a dispute to resolve that dispute fairly would render her unilateral decision just.

The tension between contracting and private promising is evident when one considers which commitments usually take the contractual form. The typical contract is a commercial, arm's length bargain, and those are the agreements the law most readily recognizes as contractual. The law is reluctant to enforce commitments made within the context of personal relationships, i.e., in precisely those contexts in which one would expect private promise to reign. To the extent contract liability—and not the unity of interests accomplished by promise—might either motivate the promisor to perform or assure the promisee of performance, any accompanying personal promise is corrupted.

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for the promisee might be excluded. But on my account, the exclusionary effect is perhaps narrower than contemplated by Raz. The promise does not, for example, exclude considerations of all first order reasons that went into the making of the promise, such as the inconvenience created by performance.

My aim is not to characterize private promise as more valuable than contract, but rather to suggest that by appreciating the difference between them, we can better mark the appropriate domain of contract law. I hope to offer an account of the relationship between contract and private promise that better accounts for everyday practice and intuition, as well as existing law. But as our practices and intuitions regarding promise vary considerably, and as the principles motivating various legal rules are ambiguous, my purpose is also to offer an attractive model of contract's relations with related promissory practices with which we can critically assess doctrine. We can then refine doctrine to better support valuable moral practices and to undermine morally repugnant ones.

To a large extent, existing rules already wisely limit the application of contract law to most private promises. Where overlap with the domain of private promise is justified, as in the regulation of marriage, appreciating the tension between private and legal promise may help explain why the justified extension of contract has been difficult to achieve in practice.<sup>7</sup> It also suggests that we can mitigate the conflict between private and legal promise by minimizing their overlap. This can be done in part by limiting the remedies for breach to ones that the private promise did not contemplate. In the context of personal relationships, this justifies the award of reliance damages rather than either expectation damages or specific performance. Reliance damages redress the injury inflicted by breach of the promise, in which the state may have a legitimate interest, but do not have the effect of either coercing performance or rendering the promisee indifferent to performance.

In other contexts, the distinction between private and legal promise calls for an expansion of the domain of contract. For example, promises made in the context of radical inequality in power, as in most employment circumstances, are often located outside the law. A promisor with vastly superior bargaining power need not promise in the contractual form in order to induce the desired conduct by the promisee; the promisor has no incentive to submit the unequal relationship to legal authority. "Downward" promises between hierarchically situated persons are not easily enforced by the state. Thus, performance of those promises usually remains at the discretion of the promisor. Such promises are false private promises. To the extent we see the depersonalization of the employment relationship as an important achievement of the liberal market economy, this account clarifies one task of contract law: the displacement of private promise in

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7. My argument for avoiding the enforcement of private promise addresses only "promissory" theories of promissory estoppel, not reliance-based theories. Reliance, or harm-based, considerations are among the public policy reasons that should motivate enforcement of certain kinds of private promise.

the realm of employment. Contract law should bend over backwards to bring such promises into the fold.

I will begin in Part I by presenting my central argument with respect to the relation between contract and promise in greater detail. Also in that Part, I will explore the distinct moral character of contract and assess (and reject) certain objections to my approach. I aim to present a fairly detailed conception of what private promise entails, but the thrust of my argument does not depend on the plausibility of those details. While I present a view of private promising in which a promisor commits to treating the promisee's related interests as equal to or greater than those of the promisor, the remainder of my argument requires the reader to agree only that the moral value of promising depends on voluntary performance.

After my discussion of the tension between promise and contract, I will consider the implications of the moral separateness of contract and private promise for contract law. In Part II, I will explore the implications for the regulation of private promise, including those cases where the state has a compelling reason not to cede territory to private norms altogether. I will suggest that, where it is necessary to regulate private promise, the state can minimize interference by offering excuses and remedies that differ from those in the private norm regime. In Part III, I consider another type of uneasy coexistence: cases of hollow private promise where the extralegal status of promising reflects oppression rather than ethical flourishing. In these cases, private promise is the one that should make room for contract.

At this point it is worth pausing to clarify certain basic features of the argument here. First, while I am critical of certain aspects of existing doctrine, on the whole, I believe my account of the tension between contract and promise is consistent with contemporary trends in contract law and related fields. Second, given that I see contract and private promise as fundamentally different, I do not follow those who argue that contract law is or should be patterned on promissory norms. But nor am I arguing that, because contract and promise are fundamentally different, promissory norms should have nothing to do with contract law. I agree with Shiffrin that we should start from the premise that "law must be made compatible with the conditions for moral agency to flourish."<sup>8</sup> Unlike Shiffrin, I believe that

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8. Shiffrin, *supra* note 3, at 712. Shiffrin calls her own approach accommodationist and distinguishes it from reflective and separatist approaches. A reflective approach seeks to model contractual obligations on moral ones, while a separatist believes that because contract has its own goals and purposes, "[t]heir pursuit does not require engagement with other moral concerns." *Id.* at 713.



contract law's accommodation of promise usually entails steering clear of private promise.<sup>9</sup>

Finally, my approach is consistent with a largely economic approach to contract. A normative defense of the economic approach, however, calls for something more than an attempt to justify the pursuit of welfare or the satisfaction of preferences. There are few that would discount the moral value of promoting welfare, satisfying most preferences, or even increasing aggregate wealth. It is implausible that these are not legitimate ends of state activity. The problem, where there is one, arises when there is a prior moral principle that must be satisfied before the state is free to pursue welfare. There are such principles, but those which have been sometimes taken to saturate contract law, leaving little or no room for efficiency concerns, are misguided. They generally stem from theories of promise which take contract to be within their undifferentiated territory. If the economic approach has thus far been taken to compete with moral theories of promise, my aim is to suggest that while both contract and private promise have rich moral import, their respective moral significance is best revealed in contrast.

## I. THE SEPARATE DOMAINS OF CONTRACT AND PRIVATE PROMISE

### A. *The Character of Private Promising*

Charles Fried has argued that the principle of autonomy requires that individuals be able to bind themselves by promising.<sup>10</sup> In *Contract as Promise* he wrote this:

In order that I be as free as possible, that my will have the greatest possible range consistent with the similar will of others, it is necessary that there be a way in which I may commit myself. It is necessary that I be able to make nonoptional a course of conduct that would otherwise be optional for me. By doing this I can facilitate the projects of others, because I can make it possible for those others to count on my future conduct, and thus those others can pursue more intricate, more far-reaching projects.<sup>11</sup>

Autonomy, on the part of both promisor and promisee, is promoted by a practice of promising.<sup>12</sup> Fried is primarily concerned with the au-

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9. Cf. Joseph Raz, *Promises in Morality and Law*, 95 HARV. L. REV. 916, 933 (1982) (reviewing P.S. ATIYAH, *PROMISES, MORALS, AND LAW* (1981)) ("One protects the practice of undertaking voluntary obligations by preventing its erosion—by making good any harm caused by its use or abuse.").

10. CHARLES FRIED, *supra* note 1, at 14-17.

11. *Id.* at 13.

12. Fried was generally focused on the autonomy interests of the promisor. But as this passage suggests, the autonomy interests of the promisee are also implicated. Kimel suggests a way in which those interests might be taken into account. In discussing the case *Jacob & Youngs v. Kent*, 129 N.E. 889 (1921), Kimel suggests that "[t]he question that

tonomy interests of the promisor, and he views enforcing promises as a required form of respect toward the promisor.<sup>13</sup> But given that promising promotes promisors' autonomy because it expands their capacity to shape their normative world, any state action that makes it more difficult for them to set the terms of their relations with other moral agents diminishes rather than enhances their autonomy. I suggest here that by enforcing certain promises, the state makes it more difficult for individuals to make private promises.

But before I attempt to show why enforcing a private promise may undermine autonomy rather than enhance it, it is useful to identify an important jump in Fried's own argument.<sup>14</sup> The fact that autonomy may require that I "be able to make nonoptional a course of conduct that would otherwise be optional for me"<sup>15</sup> does not, until the meaning of "nonoptional" is clarified, suggest in any way that the course of conduct must be made illegal. Any number of obstacles might remove a course of conduct as an option. Impossibility is one. Prohibitively high costs, including social sanction and reputation loss, is another. Immorality and illegality are other dispositive reasons to forego a course of conduct.

It may be unduly burdensome if people can only make binding commitments by rendering nonperformance impossible or highly costly for themselves. But promising is an easy way to make conduct nonoptional for people in contexts where they believe their promises are morally binding and feel bound by moral principles. Whether legal liability is a higher or lower hurdle to changing one's mind than

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should be asked in analyzing such a case from the perspective of personal autonomy is just how significant an expression of autonomy is a person's wish to have his house equipped with 'Reading' pipes rather than with virtually identical pipes of a different make." Kimel, *Neutrality*, *supra* note 5, at 484. The idea is that a liberal committed to enforcing promises because they are an expression of personal autonomy need not defer to not-so-important promises, or ones which do not implicate the autonomy interests of the promisee. Kimel seeks to save liberals from the libertarians, that is, to explain why morally problematic promises—including ones that are morally problematic in light of complex social concerns—may be taken off the table without violating core liberal principles.

13. "If we decline to take seriously the assumption of an obligation . . . to that extent we do not take [the promisor] seriously as a person." CHARLES FRIED, *supra* note 1, at 20-21.

14. Randy Barnett seems to make a similar move when he argues that "freedom to contract . . . stipulates that persons should have the power to alter by their consent their legal relations." Randy E. Barnett, *Some Problems with Contract as Promise*, 77 CORNELL L. REV. 1022, 1023-24 (1992). It is not clear why freedom of contract should be defined thus or, in particular, how this conception of freedom of contract follows from the moral value of our capacity to enter moral commitments. In any case, it is worth noting that, as I am only addressing the default rules of enforceability, there is nothing in what I am saying that would preclude the law from recognizing as enforceable certain private promises where the promisor and promisee jump through enough hoops. Thus, under my approach, nobody would lack the ability to render a commitment binding where the other party consented to that arrangement; but as the relationship between the parties appears more intimate, the parties would have to do more to definitively demonstrate that they intend their arrangements to have legal force.

15. CHARLES FRIED, *supra* note 1, at 13.

moral constraint may vary from person to person as an empirical matter; but, as a normative matter, a moral principle requiring the performance of promises may suffice in certain contexts to enable individuals to bind themselves and, more generally, to shape their moral world. In fact, the alteration of the moral status of one's future choices is probably the most important aspect of private promises.<sup>16</sup> Moral agency consists in one's ability to change one's own and other's normative status, i.e., the rights and obligations we have against each other.<sup>17</sup> But there is nothing in moral agency per se that requires corresponding legal agency.<sup>18</sup>

This shows only that enforcing promises is not necessary to enable prospective promisors to exercise moral autonomy. It does not, however, address the autonomy interests of promisees, who would benefit from greater assurance that their reliance is not misplaced, and it does not deny that enforcing promises might thereby indirectly promote promisors' autonomy (because their choices, too, will expand as a result of promisee assurance). It may be that moral autonomy is well served by the enforcement of many kinds of promises, notably promises to strangers. The heart of my argument is that, whatever its advantages, enforcing *private* promises is in other respects too costly from a moral point of view to justify the legal enforcement of those promises in the usual case.

The moral cost of enforcing private promises stems from the character of the relationships within which those promises are usually made. Not all noncommercial promises are made within the context of personal relationships, but most are.<sup>19</sup> Most people do not make

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16. Cf. Thomas Scanlon, *Promises and Practices*, 19 PHIL. & PUB. AFF. 199, 211 (1990) ("[W]hen I say 'I promise to help you if you help me,' the reason I suggest to you that I will have for helping is just my awareness of the fact that not to return your help would, under the circumstances, be wrong: not just forbidden by some social practice, but morally wrong.").

17. Cf. Joseph Raz, *Voluntary Obligations and Normative Powers*, in NORMATIVITY AND NORMS: CRITICAL PERSPECTIVES ON KELSENIAN THEMES 468 (Stanley L. Paulson & Bonnie Litschewski Paulson eds., Bonnie Litschewski Paulson et al. trans., 1998) ("[T]o the extent that promises are a source of voluntary obligations they are made by the exercise of normative powers.").

18. The power to change one's legal status may effectively enhance moral agency in some contexts. The question here is whether promising is one of those cases; I argue it is not. At the least, exercising legal agency through private promising does not enhance moral agency.

19. Barbara Fried, *Is as Ought: The Case of Contracts*, 92 VA. L. REV. 1375, 1382 (2006) (suggesting that most people view promises "as continuous . . . with status relationships"). Even Markovits, who sees contract as an instance of promise among strangers who cease to be strangers, acknowledges that promise is more likely (or at least, the reasons for making promises are greater and more compelling) between those who are already involved with one another in some way. See Markovits, *supra* note 2, at 1437. While he recognizes that his moral theory of promising is "most suited to personal, benevolent promises," he does not go the road of focusing on personal promises. *Id.* at 1449-50. Markovits describes the duty to enter into promises as an imperfect duty, sometimes more perfect than others.

self-styled promises to strangers. One might stop there and understand a private promise just as a promise which, unlike a contractual promise, feeds off of the special relationship that caused the promisor to make her promise in the first place.

But equally as important as the effect of the relationship on the initial decision to make a promise is the relationship's effect on the nature of the promise likely to be made. It is often observed by those of varying views of promising that a promise creates or adds to the relationship between promisor and promisee.<sup>20</sup> We should distinguish between the effect of the promise on the relationship and the moral effect of the relationship on the promise, i.e., how the nature of the moral commitment embodied in a promise between intimates differs from the nature of a moral commitment made by one stranger to another.

Because a promise represents a voluntary undertaking, a promisor's intentions are critical to determining the content of her promise.<sup>21</sup> But a promisor will not normally spell out the intended normative consequences of her promise. Rather, she invokes a convention, which is in turn used by others—including her promisee—to understand the nature and scope of her commitment. Elaborating the commitment is in part an exercise in the interpretation of the promisor's communicative acts, but because a promisor by definition partakes in a preexisting convention of promise, she cannot fully control the content of that commitment short of abandoning the practice of promise altogether. A promise made within the context of a private relationship, unless expressly identified as something other than a private promise, will normally obligate the promisor according to promissory norms applicable to such private promises.

Unsurprisingly, the moral commitment made by an intimate is in some ways greater than that by a stranger. Perhaps surprisingly, in other respects, the moral commitment implied by a promise within a

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20. See, e.g., STEPHEN A. SMITH, *CONTRACT THEORY* 56-58 (2004) (taking the position that promises are intrinsically valuable because they create a special relationship between promisor and promisee); Raz, *supra* note 9, at 929 (“[V]oluntary undertakings play an important role in the development of all [personal] relations, however formed, and their violation is often a cause or a sign of the loosening or disintegration of the relationship.”).

21. Thus, whether a promise commits the promisor to performing under X conditions turns on whether the promisor intended to undertake an obligation to perform under X conditions. See Steven Shavell, *Is Breach of Contract Immoral?*, 56 EMORY L.J. 439, 443 (2006). However, without attempting to resolve here whether or to what extent the content of the promise is controlled by the promisor's subjective intention, the promisee's predictable understanding of that intention, or a reasonable observer's interpretation of the promise, I presume here that (1) the express words of a promise will not alone suffice to decide the scope of the commitment under all conditions (i.e., all promises are incomplete promises) and (2) a commitment specified such that it departs radically from any familiar form of promise fails as a promise and is best understood as a commitment short of promise. From these assumptions it follows that we can expect common promissory norms to inform the nature of the commitment undertaken in a promise. Those norms will be relevant to any construction of promissory intent.

close relationship is less rigorous. Experience belies the frequent, implicit claim that a promise is the functional equivalent of an inexorable command to perform; it alters but does not eliminate deliberation at the stage of performance. While even a private promise involves a delegation of authority to the promisee, it is only a partial delegation of authority in a narrow sense. The obligation created by a private promise is not simply to perform a specified action, but to regard the decision whether to perform that act, in the future, in a particular manner. A private promisor is normally obligated to give greater weight to her promisee's interests than her own—how much greater weight will depend on the nature of the promise and the relationships within which it takes place.

Because the weight we are obligated to give each other's interests is an important dimension of our normative relations to one another, a private promise does alter the promisor's normative status vis-à-vis her promisee. Inasmuch as she must defer not only to the promisee's interests but also the promisee's understanding of those interests, because those will control the specific content of her duty, she has indeed delegated partial authority over her future action. But the promisor herself has not ceded authority over her future actions entirely. The promise will require deliberation to execute. The promisor must consider not just whether to keep the promise, but what exactly the promise requires of her once future facts reveal themselves. She is, however, bound to regard those future facts differently than she likely would in the absence of her promise.

We can capture the normal content of a private promise this way: When A promises to do X for B, where A and B are close, A promises to treat B's interests in X as of greater weight than A's own interests implicated by X.

An example may evoke the intuition expressed in this account of ordinary private promise. If A promises to pick B up from the airport, A will pick B up from the airport if it makes sense. Notwithstanding the drama sometimes invoked by the language of promise, A's promise does not require A to pick B up from the airport even if A falls deathly ill and can easily arrange for someone else to pick up B. The promise does require A to pick up B if it becomes more inconvenient for A but still not as inconvenient as it would be for B to get home without A's help. One might argue that there are cases where it no longer makes sense, all things considered, for A to pick up B—e.g., A learns that B prefers some other transport which had not been available but has become available since the time of the promise—but that A is still morally obligated to pick B up until B excuses A. This characterization of A's obligations is misleading, however. While A might be obligated to ask B to be excused, this request does no work except to ensure that A is right about her assessment of B's interests and to

put B on notice of the new arrangement. This is demonstrated by the fact that, should A be absolutely confident that B prefers the new arrangement, it would not be a breach of A's promise for her to leave a message for B simply informing B of the new plan. B's actual consent is not important where there is no uncertainty about B's understanding of her interests.

If the intuitions expressed in the example are consistent with the reader's, it should be clear that A owes B more and less than what A would owe a complete stranger C whom she has agreed to pick up from the airport for \$50. If A does not pick up C as promised, whether A will have to compensate C for nonperformance will usually turn not just on the change of circumstances, but on how the parties would have been expected to allocate rights and responsibilities had the new circumstances been contemplated at the time of contract. Thus, if A claims she will not do the pickup for \$50 because it is raining, one might look to the market to see whether \$50 airport rides are normally subject to weather conditions and whether it would make sense to understand them that way (it might depend on how often it rains and what effect rain has on the cost of the trip). No such considerations would be relevant to deciding whether A must fulfill her promise to B in the event of rain; instead, whether A should pick up B probably depends on whether B has other transport options that make more sense on a rainy day. For example, A might be excused because under the new circumstances B should take the train, which may still take longer than driving in rain traffic in one direction, but less time than A driving back and forth in the rain. Similarly, A's promise to C to perform for \$50 may be excused where C failed to inform her that C had so much luggage that it would have to be strapped to the roof of A's car, if it would have been reasonable to charge more for that, even if the total cost of performance was still below \$50 for A. A would have to live with B's excess luggage, however, unless there was some alternative that was better for them both. On the other hand, if A made her promise to B not knowing about B's luggage, and A has bicycles on top of her car that are risky to dismount, B will have to accept squishing her luggage into A's dirty car trunk if at all possible.

Although A's obligations are not uniformly more rigorous to either B or C, in some respects, A's obligations to B are greater than to C, and these aspects of promise may explain why we might normally take private promises "more seriously" than merely legal ones. If something entirely unforeseeable befell C, such that A's performance became critical, A would not be any more or less obligated to perform. By contrast, if the same thing happened to B, A would be obligated to pick B up even if circumstances have changed for A in a way that she would have expected to excuse her. For example, if C unexpectedly

breaks his legs (on an undisclosed helicopter skiing trip) and the alternative to A's pickup (where A happens to have a wheelchair lift) is a costly special vehicle that can accommodate wheelchairs, A would not be responsible for the unexpectedly high loss resulting from non-performance of her promise because C's need to use A's wheelchair lift was not foreseeable at the time she made the promise, even if she was fully aware of C's plight at the time she informed him that she would not be picking him up. By contrast, A's obligation to B would rise should misfortune befall B that made A's performance more important to B. A would be required to pick B up even if A was unexpectedly unable to reschedule the dentist appointment which conflicted with B's arrival time.

Finally, if A chooses not to perform because she is offered \$500 to do something else, she would only be expected to pay C the actual loss that C suffers as a result of A's nonperformance. By contrast, A might be expected to share some of the windfall with B, perhaps by taking B to dinner (the precise distribution would depend on the closeness of the relationship). Similarly, if A fails to perform because she has a car accident, she has no further obligation to B. She is not required to pay B for his taxi; B effectively shares in her misfortune. But if A makes a promise to a stranger and the accident is of a non-exotic, reoccurring sort, she may be required to compensate C for any losses that result from her nonperformance.<sup>22</sup>

Markovits suggests that something even more rigorous than the interest aggregation I have described takes place whenever a promise is made, whether to an intimate or a stranger. He claims that "[a]s a formal matter, at least, contractual promisors, just as promisors simpliciter, intend to give their promisees authority over their ends—to pursue, within the sphere of the contract, only ends that their promisees also affirm."<sup>23</sup> But this does not accurately characterize contractual relations. In a relationship, one may adopt another's ends, and then those ends may adjust as that other person and her objectives evolve. However, in an arm's length transaction, one does not adopt the other's ends; rather, one commits only to particular means (i.e., to supply particular means) to the other party's separately held end. A contracting party's obligations are determined in part, as an interpretative matter, by a reasonable understanding of her partner's purpose in entering into the contract. But it is not the partner's ends *per se* that are important. Only her ends as they were both contem-

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22. My characterization of what promises require between strangers is obviously informed by contract law. But while Shiffrin, because she takes contractual promises to be subject to private promissory norms, perceives the divergence between contract and promise as problematic and in need of correction, I take this divergence as evidence that contract and private promise are different animals. See Shiffrin, *supra* note 3.

23. Markovits, *supra* note 2, at 1448.

plated and expressed at the moment of contract are important, and even then, they play only an evidentiary role.

Why does the existence of a personal relationship between promisor and promisee make a difference? After all, to give equal weight to another's interests is to maximize joint interests, and economic theories of law are about interest maximization too. There are two important differences. First, interest maximization in the context of economic theory adopts primarily an *ex ante* perspective. That is, an economist would not simply maximize the joint interests of the parties to a particular contract. The economist would maximize the interests of all present and future parties to similar contracts, and that may entail a welfare-diminishing distribution in a particular case. This helps explain most of the differences between private and commercial promise identified above. It is because the norms that apply between strangers turn on establishing the right incentives at the time of promise, not just at the time of performance, and on minimizing the cost of resolving their disputes that the scope of parties' obligations depends on what was communicated or known and what prevailed in the market at the time of promise. The *ex ante* perspective is appropriate to strangers.<sup>24</sup> Because intimates know more about each other, they can more reliably assess and act on a richer account of each other's evolving interests; to the extent this holds true, they can adopt and continually update an *ex post* view.

The last point relates to a second. Interest combination between intimates is often accompanied by some measure of joint consumption or voluntary internal redistribution. There is no such presumption in a contracts case. It would be unfair for the court to adopt an aggregation approach with respect to two individual parties where that approach results in clear distributive consequences and there is no reason to believe the imbalance will be corrected. This is because the contract does not create a community within which there are specific grounds or mechanisms for subsequent redistribution between the parties. To maximize the combined interests of two contracting parties is no less arbitrary than reallocating resources between five

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24. It is not surprising that the *ex ante* view should be more appropriate to contract and the *ex post* view more appropriate to parties situated within a promissory relationship. The *ex ante* view will generally be appropriate to understanding the terms of relationships between strangers. It is not a coincidence that not just economists but Rawlsians committed to the moral vantage afforded by a veil of ignorance seek to understand the rights and responsibilities of persons toward each other without taking into account which of a range of traits and values particular individuals bear. Outside of the arts, personal familiarity is generally necessary before one is either capable of or motivated to take proper account of all those facts and feelings that determine a person's true interests. Those moments in which we understand and can respond to a stranger as a complete person are rare and ennobling. But while they may illuminate our understanding of ourselves and our relation to others, they would be distorting as an account of everyday experience on which we could base legal rules.



randomly selected persons in order to employ those resources most efficiently. By contrast, contract rules set from an *ex ante* perspective maximize the welfare of a nonarbitrarily defined political community, within which distribution also takes place. In private promise, the unity of interest created by promise against the background of already partially unified interests makes the distribution of gains and losses less important. The aim of private promise is unity, and distribution takes place only between separates.

One might argue that true intimates already treat each other's interests as of equal if not greater weight than their own, such that promising cannot have the claimed effect. But first, not all intimates are so situated that they are obligated to treat each other's interests as equal or more weighty, though sometimes the nature of a relationship (e.g., parent and child) may entail such an obligation even in the absence of promise. Where interest aggregation is expected and obligatory for other reasons, promises are superfluous and rarely made. Where combining interests is expected but not morally compulsory (prior to promise), a promise moves the relationship along incrementally to that still more intimate state where combining interests is both expected and obligatory. A single promise will not catapult a relationship to one where all choices are made always with aggregate interests in mind. But the more promises have been made, the more interest aggregation becomes the parties' *modus operandi*, and the closer the parties become. Where combining interests is not only not obligatory but entirely unexpected, as between strangers, promising does not take this form.

While the notion of combining interests is not loaded with affect, it is only practical or appealing among intimates. We often take into account others' interests, and kind and generous persons give the interests of others more weight than unkind and selfish persons. But to treat someone else's interests as just as important as one's own in one's private decisionmaking is a rare thing. The effect of a promise between intimates is to unify the interests of promisor and promisee with respect to the content of the promise. Going forward, a private promisor keeps a promise because it is the unified interest of promisor and promisee. The promisor may no longer act on her interests alone. This is rare.

The effect of intimacy on the character of a promise feeds back into the nature of the relationship. As others have observed, behaving trustworthily and in a trusting manner promotes trust. Combining interests in one sphere has the effect of unifying interests in other spheres. Indeed, this is often the reason for making promises in the first place.

But this effect is only achieved inasmuch as the promisee can see that the promisor acts from unified interests. This is so because, in

most cases, the promise is supposed to enact a change in the calculation of interests (recall that promises are usually made between those who are close and seek to become closer).<sup>25</sup> That change must be manifest somehow. While it may be possible for a person to harbor an interest in literature without ever acting on that interest by reading, it is less plausible to say that one has acquired an interest in literature where there has been no behavioral change.

Layering contractual obligation over the commitment contained in a private promise makes it difficult for the promisor to treat her promisee's interest as of equal or greater weight than her own and makes it more difficult for the promisee to act on the belief that the promisor will give the promisee's interests appropriate weight. Performance of a private promise is not usually in the promisor's interest except inasmuch as she chooses to act on the promisee's interests,<sup>26</sup> either because of the commitment to do so contained in her promise or because she is moved by those interests again at the time of performance.<sup>27</sup> But a contractual promise creates a selfish reason for performance. It creates a reason that not only speaks to the promisor's own interests but also turns on the divergence of interest between promisor and promisee. Similarly, the promisee who would otherwise rely on the unity of her promisor's interests with her own will now rely instead on the legal priority of her interests over the promisor's. Even if the promisee intends to excuse the promisor from performance in circumstances where performance would be morally but not legally excused, to the extent that intent is not manifest in the contract's terms, the promisee will find herself in the position of exercising power over the promisor that is incompatible with the uni-

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25. In stressing the transformative effect of the promise itself, I depart from P.S. Atiyah, who claims that promises may operate as admissions with respect to preexisting obligations. See P.S. ATIYAH, *PROMISES, MORALS, AND LAW* 184-202 (1981). Although he first characterizes a binding promise as a type of consent (which would imply that the promise at least has real normative effect), Atiyah goes on to suggest that the justification for treating the promise as consensual is often that the promise concedes the existence of preexisting obligations. *Id.* at 184. I follow Atiyah in recognizing that a promise often acknowledges background circumstances; in particular, the state of relationships. But as Raz has observed, reducing promise to an evidentiary function misses the obligation created by promise. Raz, *supra* note 9, at 925. I would add that the nature of preexisting obligations, and in particular, the degree of unity of interest, affects the content of the additional obligation (to treat interests as common) undertaken by promise.

26. In bilateral private promises, the promise may be in the promisor's interest, but the value of the other's performance is greater, and the burden of one's own performance is less because of the existence of a personal relationship. Thus, the making of the promise is usually still contingent on the existence of a close personal relationship.

27. The promisee's interest in performance (at the time of performance) and the fact of the promisor's earlier promise are separable reasons to perform, but unlike reasons relating to legal liability, these reasons can coexist without tension. That the promisee's interest in performance operates as a reason for the promisor to perform is consistent with the nature of the commitment undertaken in her earlier promise, i.e., to adopt the promisee's interests as her own.

ty a promise would otherwise accomplish.<sup>28</sup> The contract has a separating effect that undermines the unifying effect of promise.

My characterization of promise admittedly hinges on a positive claim about the nature of the practice. But this picture is intuitive, not idiosyncratic; others have made similar observations. Melvin Eisenberg has argued that donative promises should not be enforceable because “the world of gift is driven by affective considerations like love, affection, friendship, gratitude, and comradeship” and “[t]hat world would be impoverished if it were to be collapsed into the world of contract.”<sup>29</sup> He, too, noted the unifying effects of promises between intimates, contrasting promises within personal relationships with those in a commercial context,<sup>30</sup> and observed the problem of demonstrating the motive behind performance of a donative promise.<sup>31</sup> Dori Kimel has also made this point regarding the psychology of promising, emphasizing that promises rely on and communicate trust.

Promises are typically made or exchanged in the framework of ongoing personal relationships. . . . Through [them], messages can be conveyed and assurances can be given that trust and its counterpart, respect—surely two of the most important building blocks of every kind of personal relationship—obtain in the relationship between promisor and promisee.<sup>32</sup>

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28. In fact, contract implies at least a tentative willingness on the part of the promisee to inflict actual harm on the promisor's interests. See KIMEL, PROMISE, *supra* note 5, at 44 (“To make a threat is to communicate the intention to bring about, under certain conditions (non-compliance), a consequence which is (or is thought to be) something the addressee would wish to avoid.”).

29. Melvin Aron Eisenberg, *The World of Contract and the World of Gift*, 85 CALIF. L. REV. 821, 847 (1997).

30. *Id.* (“Commodification stresses separateness both between ourselves and our things and between ourselves and other people. . . . [G]ifts diminish separateness.”).

31. *Id.* at 848 (“Under an enforceability regime, it could never be clear to the promisee, or even to the promisor, whether a donative promise that was made in a spirit of love, friendship, affection, or the like, was also performed for those reasons, or instead was performed to discharge a legal obligation or avoid a lawsuit.”).

32. Kimel, *Neutrality*, *supra* note 5, at 490. Kimel, however, does not view the content of promissory obligations as turning on the nature of the relationship within which a promise was made. Cf. Anthony J. Bellia, Jr., *Promises, Trust, and Contract Law*, 47 AM. J. JURIS. 25, 28 (2002) (“[T]he intrinsic value of a promise, whether unenforceable or enforceable, does not lie in its capacity to reinforce interpersonal relationships of trust. Even in relationships of ‘perfect’ trust, there would be a need for promises, and a law of contract that supports the trustworthiness of the practice does not perforce degrade the trustworthiness of the persons who employ it.”). While promises may not be merely a corrective for trust, promises do unify otherwise separate interests and would be superfluous where interests are already unified.

The argument here is also consistent with Meir Dan-Cohen's argument that normativity and authority are disjunctive. See Meir Dan-Cohen, *In Defense of Defiance*, 23 PHIL. & PUB. AFF. 24 (1994). Although ultimately concerned to “display the different ways in which backing imperatives with sanctions detracts from the normative force that an authority's utterances might otherwise have,” *id.* at 26, Dan-Cohen argues for the disjunctivity of normativity and coercion more generally through his discussion of requests. He maintains that a person's willingness to compel another's behavior, “a willingness he manifests

Notably, it is the character of the relationship within which private promises are normally made, and not their commonly unilateral character, which fundamentally distinguishes them from contract.<sup>33</sup> The unilateral character of many private promises *reflects* the fact that the promisor undertakes to act from unified motives and therefore need not link the promisee's interest to a separate interest on the part of the promisor. While private promises may take the form of mutual promise, what constitutes reciprocity between the interests of separate persons amounts to internal symmetry within unified interests. Importantly, unity of interest with respect to the content of a given promise does not precede the promise but is the product of it. That is, while a relationship within which some unity of interest exists forms the backdrop against which a private promise is normally made, the promise itself extends that unity by establishing unity of interest with respect to the content of the promise. A private promise thus feeds on a background relationship that may have been previously buttressed through promise, but it does not depend on the exchange form.

Although private promise may be either unilateral or bilateral, contract is necessarily bilateral. A particular contractual promise may not be explicitly linked to a reciprocal promise (and therefore may not qualify as bilateral in contract terms), but a promise motivated by self-interest always contemplates some return. Sometimes the return is reliance that is useful to the promisor; sometimes the return is improved performance of outstanding promises; sometimes the return is credibility that will allow the promisor flexibility in future economic dealings with the promisee or others. But as there is no unity of interest with respect to the content of a contractual promise, the promisor must have a reason to make the promise that is separate from the promisee's interest in obtaining it.

While I believe that the most appropriate way to understand the divergence of contract and private promise lies in the unity of interests created by private promise, which is absent and indeed inappro-

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by the use of a coercive threat, evaporates the normative force his request originally had." *Id.* at 29. "Since coercive threats are avowedly designed to compel compliance, they deprive obedience of its expressive, or communicative, potential." *Id.* at 38. By treating a request as a content-independent reason for performing the request, a person demonstrates to the maker of the request the esteem in which she holds him. *Id.* at 41.

33. See Eisenberg, *supra* note 29, at 833, 844 ("[I]n modern contract law the basic fault line in consideration runs at the boundary between commercial promises and donative promises" and, in the case of donative promises, "the reciprocal transfer would be more likely to poison the relationship between A and B than to promote it."); Anne de Moor, *Are Contracts Promises?*, in OXFORD ESSAYS IN JURISPRUDENCE 103, 113 (John Eekelaar & John Bell eds., Ser. No. 3, 1987) (arguing that the promising in contracts is essentially bilateral and therefore conditional, in that each promise is conditioned on the other, and "[t]here are reasons for doubting whether conditional promising can give rise to the required special relationship").

private outside of personal relationships, one need not buy this specific conception of private promise in order to appreciate the more general point that private promise is unlike contract in (1) the nature of the obligation undertaken and (2) its effect on the relationship within which it takes place, and that, as a result, (3) voluntary performance is essential to private but not legal promise. That divergence is neglected in contract theory. But there is no reason to expect that the same rules should govern all communicated commitments.<sup>34</sup>

Just as private promise is the stuff of personal relationships, contract structures ordinary commercial exchange. Commercial exchange takes place between separately self-interested parties who do not undertake to promote the other's good but only to perform on terms that serve their own interests. If some parts of the law are designed for a nation of devils, contract law is best suited to a nation of strangers. It ensures that parties behave respectfully, i.e., in accordance with just rules that serve the public interest. Like an overly stringent cleaner, when those rules are applied to parties who are not strangers (or rather, to the degree contracting parties are not strangers), they may leave unpleasant marks on the parties' relationship. Just as law designed for devils may have perverse results when applied to angels, so too will law designed for strangers produce unfortunate effects on intimates.

### B. *The Character of Contract*

None of this is to deny the moral character of contractual relations and contract performance. Although it is a mistake to regard all promises as having an identical normative structure, it is useful to speak of contract as a kind of promise (distinct from the substantial subset of promise that is private promise) because it highlights certain moral properties that contract has in common with other kinds of promise. In particular, all promissory practices recognize an individual's power to obligate her future self and to create a corresponding entitlement in another. This tremendous moral capacity helps us create continuous and interlinked moral identities, and it is worth preserving.

But the moral value of contract as a promissory practice does not exhaust the moral significance of contractual obligation. Just as the

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34. This intuition has been expressed elsewhere. See, e.g., Richard Craswell, *Contract Law, Default Rules, and the Philosophy of Promising*, 88 MICH. L. REV. 489, 506 (1989) ("[A]ny serious sociological inquiry would very likely identify several different forms of promising, each with different background rules and assumptions, even within a single community. At the very least, it would certainly be *possible* for a society to recognize several different kinds of promises, each with a different set of rules defining the exact scope of the obligation."); Barbara Fried, *supra* note 19, at 1381 ("People's sense that promises are a uniquely privileged source of obligation seems to me highly dependent on the context—personal versus commercial—and content of the promise, as well as on the consequences of not keeping it.").

fact that private promise takes place between intimates adds to the normative structure of private promise, the fact that contract normally takes place between strangers (or those who are more strangers than intimates) is also important to a full picture of the normative character of contract.

Even involuntary relations between strangers, as in politics, are regulated by moral principles. Contract has something important in common with other kinds of promise, but the respect that is manifest in playing by the rules of contract is also related to the sense of civic duty manifest in paying one's taxes in full and on time. In other words, contract, at least in some respects, is like any number of extralegal agreements or arrangements in which one participates without ever making a promise.<sup>35</sup>

Most political theorists have focused on those obligations between individuals and groups in a political community fulfilled through broad social policies. Others have attempted to derive from the principles of a liberal democratic society those principles which govern individual citizens' relations with one another. Tort theory, in particular, is marked by disagreement between those who see tort as essentially an instance of larger social policies (whether welfare-enhancing or distributive) and others who believe tort embodies prepolitical duties owed by individuals to each other. There are intermediate positions, which recognize that the state may pursue macro ends but is constrained in its "use" of litigants by principles of fairness and responsibility.

A similar but less developed debate exists within contract theory. The choice again seems to be between, on the one hand, treating contract as an instance of economic regulation, or on the other hand, seeing the rules of contract as reflective of prepolitical principles of promise and the like. While it is not my purpose here to advance a metatheory of contract, I do show here that the prepolitical principles of fairness and responsibility which constrain the pursuit of social and political ends in contract do not include the promissory norms that govern ordinary private promise.

Nevertheless, the very fact that contract is part of a system of social cooperation and may be designed to advance collective ends, such as economic welfare and distributive justice, imbues the rules of contract with some of the moral significance characteristic of the regulatory institutions of which it is a part. Most of our political-moral obligations are satisfied through interaction with the government. In tort, our politically derived obligations are usually satisfied passively. In contract, by contrast, we comply with the law actively in our deal-

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35. The solemn character of private promises—by which I mean the self-conscious undertaking of a moral commitment to do something for a particular person—may have more in common with other moral commitments one undertakes than with contract.

ings with other individuals. Contract is thus uniquely posed as an arena in which civic respect is at once at work and on display.

Markovits has argued that contract, as an instance of promise, entails a respectful community between the parties that is not based on affection.<sup>36</sup> He emphasizes the moral value of contract-making (as opposed to mere contract-keeping) and suggests that it is a means by which we overcome the isolation of our wills and engage in collaborative projects with others.<sup>37</sup> Markovits argues that we cease to remain strangers upon entering a contract.

But this exaggerates either the effect of contract on contracting parties or the degree of estrangement implied in one's precontractual status as a stranger. It might be that Markovits believes parties become closer than they do upon entering a contract. But as I have argued, they do not adopt each other's ends or projects (as he effectively acknowledges in conceding contract does not entail shared cooperative activity).<sup>38</sup> Markovits suggests that contractual parties concern themselves with each other's points of view in a way that strangers would not.<sup>39</sup> Contracting parties do take into account each other's intentions inasmuch as the apparent intentions of the parties determine the terms of the contract, thus inducing each party to attend to the other's intentions at least insofar as it determines her own rights and obligations under the contract. Moreover, the parties defer to the other's point of view in some respects at the time of contract; after all, the value the promisee places on performance is the only relevant value of that performance when it comes to damages. But if taking into account others' points of view is all that it takes to become more than strangers, then most contracting parties were not strangers to begin with.

Markovits himself invokes the analogy between commercial and social contract.<sup>40</sup> In the latter, parties must take into account fellow citizens' points of view if their political conduct is to adequately support a liberal democratic order. It is the separateness of the point of view, and the need to take it into account as that point of view of the other, that marks the relation as that of strangers. In the liberal model, we engage our sense of justice as we decide those principles which will govern the basic structure of society. But within the boundaries created by those principles, one is free to pursue one's conception of the good without deferring so radically to the interests of others (though some conceptions of the good may dictate other-

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36. See Markovits, *supra* note 2, at 1432, 1451.

37. *Id.* at 1449.

38. *Id.* at 1457.

39. *Id.* at 1451.

40. Daniel Markovits, *Arbitration's Arbitrage: Social Solidarity at the Nexus of Adjudication and Contract*, 59 DEPAUL L. REV. 431, 466 (2010).

wise). Likewise, parties to a contract must take into account the other's intentions in understanding the boundaries of their sphere of choice, but in selecting their course of action within those boundaries, parties are unencumbered by the other party's general interests. Contracting parties are not radically isolated from each other prior to contract, but nor does contract bring them together so as to fundamentally alter their relations. While repeated contract might be an occasion for parties to develop a personal relationship within which private promise might take place, the bare fact of exchange—even repeated exchange—does not imply any such evolution in the relationship.

The communal nature of contract refers properly not to the community created between promisor and promisee but to the larger economic and political community in which the transaction takes place. In everyday commercial experiences, one is struck not by the relationship one develops (or fails to develop) with the other party, but by the feeling of having entered an existing community in which this transaction regularly takes place. The fact that the contract takes place as one among numerous similar contracts that each party has, could, or will enter into with others dictates the terms of the particular agreement at hand, most notably by determining the parties' expectations and price. My confidence in my contractual partner's performance is shaped by others' past experiences with that same partner, the fact that others will seek (or be responsive to) information from me about that partner before they enter into relations with him in the future, and in part by the legal context. Generality and commonality are characteristic of the marketplace. By contrast, particularity and contextuality are characteristic of promise. Therein lies the felt difference between reading a product review on a consumer website and reading an inevitably odd account in a magazine of how one should handle one's spouse.

The impersonal nature of contract is an opportunity to show respect to others qua person, for one does not know or is, in any event, usually not interested in much else about the other party (besides those aspects relevant to that person's ability to perform). Thus when one plays by the rules in contract, one not only acknowledges the continuity of moral identity, but in deferring to those common rules with respect to the substance of one's obligation and its consequences, one demonstrates respect for all those for whom the rules were designed. Playing by the rules is a form of respect that has nothing to do with the particular other person with whom one happens to be dealing. This is especially evident when one thinks about what it means not to play by the rules with the average contracting party. A consumer that returns an item she has herself broken does not just harm the company but also all the other consumers who now will have to pay more for goods with a comparable return policy or, in many cases, to



the many shareholders whose interest in the company is marginally diminished. We need not reduce the moral obligation to a consequentialist one to see that the consequences of a wrong are relevant to identifying whom one has in fact wronged. Arrangements in which I am not directly involved (e.g., price collusion) may make a given contract of mine more wrongful to me than another in which the other party has intentionally withheld some undetectable aspect of his performance. Contract wrongs are appropriately understood as both promissory wrongs and as part of the range of wrongs that amount to failure to play by the rules of fair commercial exchange.<sup>41</sup>

Dori Kimel has suggested that the impersonal nature of contract is also a value in itself. Contract provides a framework for

doing certain things with others not only outside of the contexts of already-existing personal relationships, but also without a commitment to the future prospect of such relationships, without being required to know much or form opinions about the personal attributes of others, and without having to allow others to know much and form opinions about oneself.<sup>42</sup>

Kimel calls the value of this opportunity the value of personal detachment.<sup>43</sup> Kimel suggests that at least part of the value of personal detachment is that it keeps commercial relationships from overwhelming truly intimate ones. “[T]he more dependent people are on personal relations for the pursuit of goals which are, themselves, external to such relations, and the less selective they are allowed to be in creating, developing, and maintaining their personal relations, the less valuable the relations they have are likely to be.”<sup>44</sup> In his insight that personal detachment is valuable in part because it is necessary to throw intimacy into relief, Kimel points toward the value of *relational diversity*: the value in having different levels of trust and sharing with different people in different parts of our lives.

It is easy to romanticize personal relationships and systematically favor them over other types of relationships. One often perceives in cultural commentary nostalgia for a time when one’s interactions with everyone were ostensibly personal and intimate. Restaurants, for example, are celebrated where the waiter appears sincerely interested in one’s culinary experience. I would suggest that this is misguided. Like intimacy, private promises are valuable because they are rare and not appropriate in most interpersonal contexts. Were our daily lives swamped with such promises, promising would be drained of partiality. And promising without partiality is not much

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41. It is not necessary to reduce contract to these general wrongs. See generally GRANT GILMORE, *THE DEATH OF CONTRACT* (Ronald K.L. Collins ed., 2d ed. 1995).

42. Kimel, *Neutrality*, *supra* note 5, at 491-92.

43. *Id.* at 492.

44. *Id.*

more appealing than friendship without partiality. There is a pleasure in promising a friend that one will help her in a time of need. But there is also a pleasure in anonymously purchasing a carton of milk without having to engage the full range of one's moral capacities. These pleasures are associated with distinct moral values, and to preserve both, the law must respect the distinction between contract and private promise.

*C. Objections to the Divergence of Contract and Private Promise*

Before exploring implications of my approach for the scope of contract law, I will consider some objections to the basic approach to promise I have suggested here. I will start out by considering two methodological objections, though they relate to certain substantive objections I will consider separately.

The two methodological objections can be stated as questions: First, what makes my characterization of promise promissory? Second, in what sense is what I characterize as a private promise more private than other types of promise?

My account of promise is promissory to the very extent it accords with and explains what we commonly regard as the practice of promising. There is undoubtedly no consensus on what promise entails. Inasmuch as my account ventures to detail rather specifically the nature of the obligation undertaken in promise, it is more likely to strike some as false. I have not attempted to explain why promising should entail treating promisee's interests with respect to the content of the promise as of equal or greater weight, because I do not believe that promising has to take that form, and indeed, I believe it takes that form only within personal relationships. Nevertheless, promising does take that form in personal relationships, and this is the context in which most promises are made. I believe characterizing promise in this way captures what many promisors and promisees intend and experience when they participate in the practice of promising. I am not concerned here with the language with which one makes a promise, but what I describe as promise is not limited to those commitments expressly labeled by the promisor as promise.

One might argue that what I characterize as private promise is but a modified form of promise. On this view, promise has a universal (probably quite rigorous) form, and the commitments made within personal relationships are diluted by foreign, nonpromissory norms, such as the norms endogenous between lovers or friends.<sup>45</sup> The universal form of promise is a Platonic ideal, as compared to which any instance of promise is but a pale shadow.

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45. I thank Dori Kimel for articulating this position.

I do not think such an approach is conceptually flawed, but it is simply less useful than the more flexible approach pursued here. Recognizing private promise as distinct from other sorts of promises does not deny that there is moral continuity with other forms of promise. It may be useful to preserve a larger category of promise in order to recognize the moral significance of the general practice of binding oneself to others. But that broad practice is diverse, and it obfuscates more than it illuminates the practice to insist that it is subject to common norms, which are substantially modified and perhaps compete with others before directing promisors' conduct in a given case. Of course, if private promise were just an unusual case of promise, such that most promises were not so modified, this alternative approach would make sense; the universal form of promise would be no Platonic ideal—it would be an empirically confirmable fact. But I think private promise is too close to what is commonly regarded as the paradigmatic promise to be explained as an exceptional category of modified promise.

Moreover, the features of promise which vary across contexts are too important to be regarded as mere modifications of a uniform practice of promise. The overarching moral feature of promise that is common to all types is the exercise of autonomy to create simultaneously an obligation for oneself and a right in another person. That defining feature of a promise may generate "identification" norms that are common to many types of promise; that is, this central moral structure of promise may determine which commitments we properly regard as promissory. But regulatory norms of promise are as important as these identification norms. Regulatory norms determine when a promise must be kept (including what counts as keeping a promise) and what happens (morally speaking) when a promise is breached. The regulatory aspects of promise, which speak to the content of the commitment undertaken, are as central to promise as identification norms, and I have argued that these regulatory norms vary considerably depending on the context in which a commitment is made. Were regulatory norms excluded from the larger category of promissory norms in order to preserve a uniform notion of promise, the concept of promise would be too light; it would fail to explain essential aspects of the practice. For this reason, I think it makes sense to speak of different kinds of promise, rather than pure promise, on the one hand, and distortions of promise, on the other.

The second methodological objection raises the question of precisely to which promisors and promisees I am referring. I believe that private promising takes place between friends, relatives, and lovers. Just as there is no universal form of promising, there is no single form of promising between lovers or among friends and family, but I think that those in such relationships internalize the interests of the

others to some degree. A promise does not entail radically internalizing all of the other's interests; indeed, small promises at the early stage of friendship may reflect only limited unity of interests. By contrasting private promise with contract, I do not mean to suggest that there are two categories into which all promises can be easily separated or that all promises that I would label private promises are alike. Some promises are more private than others, in that some take place within closer relationships than others. Promises made in relationships where many interests are already pooled likely will be taken by the parties to have greater unifying effect than a promise made between acquaintances who are only beginning to take each other's ends as among their own.

This leads to an array of substantive objections to my characterization of promise and its workings. For example, one might claim that a promise need not create a sufficient reason for acting on its content; perhaps a promise need only be a but-for condition of performance. That is, one might claim that so long as the actor would not have acted but for the presence of a promise, the initial commitment qualifies as a promise. In that case, it would be irrelevant precisely why the promise triggers compliance. It might be because of the unity of interest it creates, or it might be because it sets into motion a series of events—business events that amount to reliance, or legal “events” that result in contractual status.

But such an approach is not consistent with our practice and common understanding of promise. Many of the things we promise we fully expect to want to do independently at the time of performance. The promissory character of the commitment does not depend on a change of circumstances that makes performance undesirable from the point of view of the promisor. The promise just makes it the case that we have a reason to do what we have promised should the independent reasons cease to operate. Thus, it cannot be a defining characteristic of promises that they are necessary but not sufficient reasons for their subsequent performance.

Perhaps a more likely objection would question my emphasis on the objective character of promise and reliance as essential to private promising. One might argue that enforceability does not convolute a promisor's motives, because legal enforcement is usually improbable.

First, although legal enforcement by a promisee is usually unlikely due to high transaction costs, the costs of defending a suit are also high, and thus the risks of breach are even greater than what the law strictly speaking recognizes as the compensable loss. This makes it likely that the possibility of legal enforcement is still a net reason in favor of performance. Second, it is not just the actual threat of a court order that affects the voluntariness of compliance. Most people will not do something that will subject them to legal action even if legal

action is unlikely. That is because the law is taken to condemn the conduct in question. Even if breach is not intended to be marked illegal by the availability of damages, the availability of damages upon breach makes breaching conduct at least subject to social disapproval. Even those savvy observers who might realize that the law does not ultimately discourage breach will take the availability of damages as disapproving the failure to make the nonbreaching party whole. Thus we can expect the law to create reasons for performance (or at least compensation) that would not otherwise exist.

One could also argue that enforceability does not cloud a promisor's motives because in order for enforceability to degrade the character of promise, the parties must be aware that their promises are enforceable, and this is not always the case.<sup>46</sup> Where it is really the case that promisor and promisee believe that a promise is not enforceable, this objection is valid. But without evidence to support the claim, I venture that popular tendencies are to overestimate the scope of the law. Contract law is so pervasive that parties are inclined to think they have legal redress for all but the most minor promises. The latter simply do not comprise the territory for which the divergence of contract and promise is relevant.

One might also object to the objectivity requirement by arguing that while a promise, to be effective, must be sufficient reason to perform, or sufficient reason to rely on the prospect of performance, its sufficiency need not be apparent to an objective observer. For example, one might argue that the sufficiency of the reason, i.e., that interests are unified, is important because of the close relationship it both demonstrates and reinforces, and that what may not strictly speaking be objective can nevertheless be known to parties within the relationship. For example, though your ability to profit from breach may be externally limited, I might nevertheless "know" that you would keep your promise even if there was no consequence of nonperformance to you. My knowledge may be secured by personal facts and unaffected by the fact that, by virtue of the contractual status of my promise, my knowledge pertains only to a hypothetical and cannot be confirmed.

At first blush, this characterization of promise might appear to vitiate the need for an objectivity requirement because it is consistent with certain deeply personal promises we might make. In particular, we cannot confirm the sufficiency of a promise as either a reason for action or reason for reliance in connection with any backward-looking promise. However, upon further consideration, we will see that backward-looking promises are not promises at all, and other so-called promises that are not confirmable, if they are promises,

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46. See Bellia, Jr., *supra* note 32, at 38.

are of lower value than (or at least, importantly different from) a classic promise.

A backward-looking promise is one that is contingent on an impossible event, namely, an event in the past that has not occurred. A promise contingent on an impossible event might be this: I promise that if a ghost really does live under your bed, I will catch it and throw it out the window. A backward-looking promise might be this: I promise that if I had known it was going to take you an hour to get here by bus, I would have picked you up. Or, I promise that if I hadn't already purchased my plane ticket to Aruba, I would have visited you at the hospital. These promises are not properly regarded as promises at all. An essential characteristic of promises is that they involve the assumption of a commitment. Backward-looking promises, like other promises relating to the impossible, resemble promises only in that they are intended to communicate present good will. In communicating good will, these so-called promises may, like real promises, foster and reinforce relationships between promisor and promisee. But unlike the making of a real promise, making a backward-looking promise does not actually commit one to anything.

This example should help us see why it is important that a promisor be able to disconfirm, or disavow, the normative move ostensibly achieved by promise. It must be possible to break a promise. It is impossible to break backward-looking promises and that is why they are not real promises. If a promise entails adopting as sufficient reason for action the unity of interest created by promise, then breaking a promise should entail failing to treat as sufficient reason the fact of promise. It is impossible to break a promise in this sense, where the performance of the promise is overdetermined. The objectivity requirement does not depend on an inherent skepticism about the possibility of subjective knowledge of another's intentions, though such skepticism may be warranted. The objectivity requirement stems just from the fact that a promise consists not only of an intention, but also a commitment undertaken, and it is simply impossible to make and break a commitment in the right way where the sufficiency of the promise can never be tested.

This argument parallels Kant's argument that there can be no justice between individuals who are forced to resolve disputes between themselves for lack of a third party adjudicator.<sup>47</sup> Kant's re-

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47. Kant argues that civil society is morally imperative because only then is an authority available to adjudicate private disputes in accordance with the law; only then may conflict be resolved by reason rather than force. See IMMANUEL KANT, *Metaphysical First Principles of the Doctrine of Right*, in THE METAPHYSICS OF MORALS 33, 121-24 (Mary Gregor trans. 1991); see also *id.* at 85 (discussing the impotence of unilateral will); IMMANUEL KANT, *Idea for a Universal History with a Cosmopolitan Purpose*, in KANT: POLITICAL WRITINGS 41, 44 (Hans Reiss ed., H.B. Nisbet trans., 2d enlarged ed. 1991) (dis-

fusal to recognize even a fair outcome (here defined as the outcome that would have been achieved had the dispute been resolved by a neutral third party) as just is more than an epistemological point. That is, Kant does not make the claim merely that we do not know whether the resolution arrived at by the parties is just. He explains that the very fact that the parties must resolve the dispute on their own necessarily makes it impossible for the correct, or morally relevant, criteria alone to control the outcome of the dispute. That is because even an agreement to take into account only the appropriate criteria is subject to the whim of each party, or at least that of the stronger party. Even if that party is committed to resolving the dispute fairly, the fact that the weaker party must rely on that commitment makes a factor out of the parties' respective strength. The bare existence of a corrupting reason for the weaker party to go along with an outcome, e.g., fear of the other party's use of force, undermines the legitimacy of that outcome, irrespective of whether the weaker party was subjectively motivated by that reason.

Similarly, in the case of promise, the existence of an improper reason to perform undermines the moral upshot of the decision to perform, regardless of whether the improper reason in fact motivates the decision. In a pre-civil society in which parties must resolve disputes between themselves, the absence of law corrupts even a sincere commitment by parties to resolve a dispute fairly; in the private world of promise which operates within the sphere of contract, the presence of law corrupts even a sincere commitment of a promisor to give equal weight to a promisee's interests. The absence of law corrupts the pursuit of justice; the interference of law can corrupt the pursuit of private relations.

Acknowledging the costs of imposing legal order on certain private relations does not inevitably lead to a radically liberal attitude toward law's domain. The costs of legal order are but one aspect of a well-known tension between the liberty-enhancing and liberty-restraining aspects of law. My aim is to suggest and explain what seems intuitive: that contract law too has not just the well-recognized potential to facilitate freedom by enabling planning and cooperation, but also risks suffocating personal relations that depend on their separateness from the civil order. Interference is not limited to prohibition or even regulation at odds with "internal norms."

Another objection to my characterization of promises and their necessary independence from contract law might stem from the claim that the legalization of a promise is actually akin to premature performance. Opting into a promise may demonstrate precisely the pri-

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cussing unsocial sociability); see generally Jeremy Waldron, *Kant's Legal Positivism*, 109 HARV. L. REV. 1535 (1996).

vate commitment that the promisor would otherwise have to wait until the time of performance to fully display, and for the promisee to fully appreciate. And so, the argument would go, a promisor who knowingly takes steps to give her promise legal effect is effectively beginning performance of her private promise. Zealous performance surely cannot undo the promissory status of the initial commitment.

This argument is flawed. One relatively uncontroversial feature of a promise is delay: delay between the time of promise and the time of performance. At the extreme, a promise made simultaneously with performance is better characterized as an announcement or description of one's actions. For example, "I promise to put this down gently," said as one places the fragile object carefully down is not really a promise so much as an announcement of good intentions. In certain situations, because performance takes place over time, a promise made at the time of performance may still precede completion of performance. But the promise is either once again a statement of good intentions with the implicit acknowledgment that these intentions may be thwarted by unintentional failure (such that the accounting of one's action resembles a real, future-directed promise), or the promise is in effect that one will in the future carry through on the performance one has begun. In the latter case, performance has effectively been severed into that part which is simultaneous with the promise and the performance that forms the content of the promise, i.e., the remaining performance. Any promise that is properly labeled as such promises performance in the future.

Delay between the time of promise and the time of performance has moral significance from the perspective of both promisor and promisee. From the perspective of the promisor, at least two related aspects of promising future performance is morally important. First, the fact that one is promising performance in the future enables one to bind one's future self. This expands infinitely the kinds of commitments we are capable of making and, in doing so, expands infinitely the kinds of plans we can make. Second, perhaps more basic, promising with respect to the future helps create a continuous moral person. It is because our relations with others are not recreated at each moment but ongoing that the moral person constructed out of those rights and obligations is a continuous subject.

Delay is also morally significant from the perspective of the promisee. Parallel to the promisor, the fact that the promisee can hold claims into the future and establish relationships involving obligation and entitlement helps construct a continuous moral subject. Second, the fact that one can create entitlements into the future makes reliance reasonable and enables us to plan effectively for a far greater range of activities and ambitions than would otherwise be possible. Thus, we should regard the delay between promise and performance



as essential to the moral practice of promising. We cannot then avoid the problem of contractual recognition by merely relabeling legalization or the adoption of legal form as the first step of performance.

Still another objection might be that my characterization of private promise glorifies the existence of a relationship between promisor and promisee that not only need not exist, but the existence of which may actually be improbable given the fact of promise. For example, one might argue that where true, personal, voluntary, commitment has special worth, the parties would refrain from promise and rely instead on the strength and stability of the relationship itself. Along these lines, Barbara Fried suggests that promising to do what one is already obligated to do (and perhaps to wants to do) is a “morally distancing act that introduces doubt about the emotional inevitability of performance where none previously existed.”<sup>48</sup>

As discussed earlier, it is indeed likely that complete intimates have little left to promise each other. But relationships exist along a continuum, and private promises are most likely between those who share some but not all interests. Where some but not all interests are joined, promising helps to join some subset of the unjoined interests, and that marginal increase in the unity of interest propels the parties along the continuum of intimacy.

A final objection might be that my approach does not instruct as to whose sense of the relationship determines whether a commitment is a promise or contract. Is it a matter of the lowest common denominator, such that intimacy would operate the way intention once did, i.e., would it only take the subjective absence of felt intimacy by one party to convert a private promise to contract? The problem can be solved just as the problem of intention ultimately was: by reference to objective norms. Just as we now ask whether it was reasonable for each party to believe that the other intended agreement, courts may ask whether it was reasonable for each party to believe that their relationship was under the jurisdiction of contract.

## II. REGULATING PRIVATE PROMISE

The practical implications of the above approach for private promises are twofold: First, contract law should avoid enforcing private promises except in the absence of compelling reasons independent of

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48. Barbara Fried, *supra* note 19, at 1383; *see also* P.S. Atiyah, *Fuller and the Theory of Contract*, in *ESSAYS ON CONTRACT* 73, 78 (1986) (observing that to invoke formal contract in an intimate, family relationship “often destroys the very trust on which the relationship is based”); Raz, *supra* note 9, at 931 (“It is a mark of a healthy relationship that the number of explicit promises is small and that the boundary between explicit promises and other voluntary obligations is normally invisible.”). But Raz also observes that “[p]romises between strangers are the exception, and any attempt to understand the practice of promising by focusing on these unusual promises is only too likely to breed distortions.” *Id.*

promissory norms. Second, where public policy dictates enforcing private promises, courts should minimize the injury to private promising by limiting damages to reliance.

### A. *The Scope of Enforceable Promises*

The first set of implications of my approach may be apparent: Contract doctrine should avoid enforcing private promises. Promissory norms should, as a rule, not be taken as reason to bring contract law to bear on private promises.<sup>49</sup> In many cases, it is appropriate to require that private promisors who wish to make their promises legally enforceable go out of their way, e.g., by complying with a formal writing requirement, by obtaining counsel, or through notarization.<sup>50</sup>

While the theoretical justification for this approach offered above departs from prevailing views, current doctrine already avoids enforcing most private promises. In particular, the doctrine of consideration in principle holds that only promises which are bargained for within an exchange are enforceable, and most private promises do not meet that requirement. Notably, it is extremely difficult to sub-

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49. This section together with the next shows that a theory of promise and its relation to contract can indeed bear fruit by suggesting default rules and interpretive principles. Cf. Craswell, *supra* note 34, at 504 ("It is less clear that the philosophical literature discussed above has any implications for the content of contract law's background rules. All of the authors discussed above recognize that any real system of promising would have to include some set of rules governing excuses, remedies, and other details of the promisor's obligation. Their purpose, however, was to analyze the practice of promising at a higher level of abstraction.").

50. In any context in which a formal requirement is imposed, there is the risk that promisors' and promisees' intentions with respect to the legal effect of their agreement will not be respected because of an inadvertent failure to comply with the formal requirement. Such requirements will be most appropriate in contexts where we believe most promisors and promisees do not intend their agreement to have legal effect, even in the negative sense that they have not contemplated the question. The opposite rule, which would require a promisor to avoid legal promise by way of an explicit opt-out provision, may be undesirable because a promisor who wishes to perform voluntarily may inadvertently communicate a lack of confidence in her own performance. A rule requiring that a promisor undertake legal promise expressly in these contexts may foster better communication. A promisee who insists on formal documentation of the promise in order to ensure legal enforceability communicates valuable information to the promisor about her attitude toward the promise and the relationship within which it takes place.

There are certain contexts in which we do not merely tolerate but rather encourage prospective promisors and promisees to make legally binding promises alongside their private promises. For example, a state may choose to encourage prenuptial agreements. Requiring that parties comply with burdensome formalities will reduce the likelihood that they will enter such agreements not only because of the costs involved but because neither party will wish to initiate formal contractual relations. (Thanks to Gregory Klass for this point.) We can require formalities but avoid this result if we require that the parties enter into a legally binding contract. The formal requirements will still be useful in separating out the private and legal dimensions of the parties' agreement; indeed, in some cases the legal promises might differ from the private promises made. Requiring parties to expend resources in order to enter a formal contract (in order to obtain some state benefit) may be justified if, and only if, we value highly parties' input into their future legal rights and responsibilities.

stitute moral obligation, such as that which might commonly arise within the course of a personal relationship, for consideration. Courts generally refuse to force compensation for services for which a fee could have been bargained but was not, and a reciprocal promise that is clearly related to such a past service is not enforceable either.<sup>51</sup> Courts have also inquired whether the promisee who conferred an earlier benefit would have expected compensation at the time she conferred the benefit, an inquiry that turns on the nature of the relationship between promisor and promisee.<sup>52</sup> Both of those inquiries have the effect of removing most private promises beyond the law.

It may also be the case that, in their *application* of doctrine, courts are more amenable to enforcing promises made outside of personal relationships.<sup>53</sup> For example, many of the cases in which moral obligation is rejected as an alternative basis for enforcing a promise are ones where the moral obligation arose in the context of a personal relationship. By contrast, the most common context in which “moral obligation” is given force is where a defendant promised to pay a commercial debt which is no longer otherwise collectable due to a statute of limitations.<sup>54</sup> Promises made to support family members are not usually enforced, notwithstanding the famous textbook case

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51. See RESTATEMENT (SECOND) RESTITUTION § 3 (Tentative Draft No. 1, 1983) (allowing recovery under quasi-contract only where failure to obtain consent prior to conferral of service was excused, as in “circumstances of exigency”). In *Mills v. Wyman*, a father refused to perform a promise to pay the man who cared for his son before his death. *Mills v. Wyman*, 20 Mass. 207, 209 (1825). The court described the claim as not importantly different from one in quasi-contract and left it to the “tribunal of conscience.” *Id.* at 210; see also RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 134-35 (7th ed. 2007); Saul Levmore, *Explaining Restitution*, 71 VA. L. REV. 65, 79-81 (1985).

52. Compare *In re Gerke's Estate*, 73 N.W.2d 506, 508 (1955) (“Past services rendered by a person not a member of the promisor's family are adequate consideration for a promise to compensate for them by a legacy.”) with *McMurry v. Magnusson*, 849 S.W.2d 619, 622 (1993) (“The existence of a family relationship, once it is established, gives rise to a presumption that services rendered were intended to be gratuitous. . . . For purposes of raising the presumption that services were rendered gratuitously, a family is defined as ‘a collective body of persons under one head and one domestic government, who have reciprocal, natural, or moral duties to support and care for each other.’”).

53. See Peter Benson, *Abstract Right and the Possibility of a Nondistributive Conception of Contract: Hegel and Contemporary Contract Theory*, 10 CARDOZO L. REV. 1077, 1085 (1989) (“[I]n relations of solidarity such as friendship or family where individuals do not normally regard each other [as mutually independent], the law presumes that unless the parties show otherwise they do not intend to bind themselves contractually. This is so even if their expressions of intention formally fulfill the other desiderata of contract formation.”) (citing *Balfour v. Balfour*, [1919] 2 K.B. 571 (A.C.) (Eng.) (holding that though parties agreement met criteria for contractual formation, law would presume that husband and wife did not intend to enter contract)).

54. See RESTATEMENT (SECOND) OF CONTRACTS § 82 (1981); see also *Wilson v. Butt*, 190 S.E. 260, 263 (Va. 1937) (holding that a promise to pay a debt barred by a statute of limitations is sustainable by virtue of the moral obligation arising from the debt); *Orsborn v. Old Nat'l Bank of Wash.*, 516 P.2d 795, 797 (Wash. Ct. App. 1973) (citing the “well-settled” rule that “a moral obligation arising from or connected with what was once a legal liability, which has since become suspended or barred by operation of a positive rule of law or statute, will furnish consideration for a subsequent executory promise”).

of *Ricketts v. Scothorn*.<sup>55</sup> Two textbook cases of moral obligation demonstrate the point. In *Webb v. McGowin*, Webb suffered substantial bodily injuries in successfully saving McGowin's life.<sup>56</sup> McGowin promised to support Webb for the remainder of the latter's life, but McGowin's estate ceased payment some time after McGowin's death.<sup>57</sup> The court held that McGowin's promise was enforceable because it was made in light of a preexisting moral obligation.<sup>58</sup>

The *Webb* court was careful, however, to construe the doctrine on terms that limited its scope. The court, early in its opinion, twice noted that Webb acted "within the scope of his employment" and that it was his "duty . . . in the course of his employment" to drop the pine block which, were it not diverted, would have seriously injured McGowin.<sup>59</sup> The court analogized Webb's act to the administration of medicine by a physician to an ill man, in which case subsequent promise to pay would also have been valid.<sup>60</sup> The court stated its holding in terms of property,<sup>61</sup> and went on to emphasize the economic nature of the benefit conferred:

Any holding that saving a man from death or grievous bodily harm is not a material benefit sufficient to uphold a subsequent promise to pay for the service, necessarily rests on the assumption that saving life and preservation of the body from harm have only a sentimental value. The converse of this is true. Life and preservation of the body have material, pecuniary values, measurable in dollars and cents.<sup>62</sup>

The court observed that "[t]he case at bar is clearly distinguishable from that class of cases where the consideration is a mere moral obligation or conscientious duty unconnected with receipt by promisor of benefits of a material or pecuniary nature."<sup>63</sup> The court thus went out of its way to suggest that "mere moral obligation" as might arise out of a personal relationship is an inadequate substitute for considera-

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55. 77 N.W. 365 (Neb. 1898), discussed *infra* note 71; see also *Terry v. Terry*, 217 S.W. 842, 844-45 (Mo. Ct. App. 1919) (refusing to enforce agreement among siblings to pay those who had cared for parents); Charles J. Goetz & Robert E. Scott, *Enforcing Promises: An Examination of the Basis of Contract*, 89 YALE L.J. 1261, 1306 (1980) ("Courts generally refuse to enforce intrafamilial promises under section 90, even when the promisee claims he has incurred costs from tangible actions in reliance."); see *supra* notes 52-53.

56. 168 So. 196, 196-97 (Ala. Ct. App. 1935).

57. *Id.*

58. *Id.* at 197.

59. *Id.* at 196.

60. *Id.* at 198.

61. *Id.* at 197 ("Where the promisee cares for, improves, and preserves the property of the promisor, though done without his request, it is sufficient consideration for the promisor's subsequent agreement to pay for the service . . .").

62. *Id.* at 197-98.

63. *Id.* at 198; see also *id.* ("[A] moral obligation is a sufficient consideration to support an executory promise where the promisor has received an actual pecuniary or material benefit for which he subsequently expressly promised to pay.").

tion, but that material economic benefits delivered in a context giving rise to a legitimate expectation of compensation may operate as effective substitutes for consideration.<sup>64</sup>

By contrast, in *Harrington v. Taylor*, the court refused to enforce a promise by a man whose life was saved by a friend of his wife who had intervened as the wife was about to decapitate her husband.<sup>65</sup> The wife's friend's hand was mutilated as a result of her intervention.<sup>66</sup> In this case, the court held that "however much the defendant should be impelled by common gratitude to alleviate the plaintiff's misfortune, a humanitarian act of this kind, voluntarily performed, is not such consideration as would entitle her to recover at law."<sup>67</sup> One might question the court's characterization of this case and its consistency with *Webb*. The language of the two cases suggests that the outcomes turn on whether the benefit conferred was voluntary. However, it is unlikely that Webb was obligated to throw himself down with the pine block to save McGowan, even if his job required him to drop the pine block. The difference seems rather to be the court's intuition about what motivated Webb and Harrington to save their defendants. Because Webb was acting in the course of employment, it is reasonable to believe he was not acting in the context of a personal relationship. Because Harrington, on the other hand, was acting in the context of domestic violence and became involved as a result of her friendship with the wife, the court was more willing to dismiss the incident as a private affair. It is also possible that because Harrington was a woman, it seemed more plausible to the court that her actions were "private" in nature and done with no thought as to her own economic well-being. Given that Harrington prevented the commission of a crime, one might question this implicit characterization of her conduct. But putting aside its operation in *Harrington*, we might nevertheless endorse the basic distinction between moral obligations that arise between strangers, which can generate contractual obligations, and moral obligations that arise in the context of personal relationships, which usually do not.

Reliance may operate as a substitute for consideration but limitations on that doctrine also suggest its primary application is and should be outside of personal relationships.<sup>68</sup> Contemporary courts may be reluctant to recognize reliance that is not economic, which

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64. *Id.*

65. 36 S.E.2d 227, 227 (N.C. 1945).

66. *Id.*

67. *Id.*

68. See RESTATEMENTS (SECOND) OF CONTRACTS § 90 (1981) ("A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.").

renders many private promises ineligible for estoppel.<sup>69</sup> Of course, many private promises do result in substantial economic reliance. Some of those give rise to liability because failing to acknowledge them would result in systematic injustice, as in the context of marriage.<sup>70</sup> But the fact that so many private promises are materially relied upon actually suggests that such cases do not usually generate legal liability, for if they did, the courts would be swamped with cases in which people sued to enforce broken promises that resulted in substantial economic loss. Every day people move long distances, quit jobs, buy and sell homes, purchase flights, book hotel rooms, and buy expensive clothing in reliance on promises they were made.<sup>71</sup> But

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69. See, e.g., *Atria v. Vanderbilt Univ.*, 142 F. App'x 246, 256-57 (6th Cir. 2005) ("To support a claim for promissory estoppel, however, a plaintiff must show that his reliance caused an economic detriment."); *Calabro v. Calabro*, 15 S.W.3d 873, 879 (Tenn. Ct. App. 1999) ("[T]he detriment suffered in reliance must be substantial in an economic sense."); see also Charles L. Knapp, *Rescuing Reliance: The Perils of Promissory Estoppel*, 49 HASTINGS L.J. 1191, 1253 (1998) ("Where section 90 reliance is at issue, we usually assume that it must be detrimental in some 'substantial' sense—probably economic . . .").

One not-so-contemporary exception is *Hamer v. Sidway*, 27 N.E. 256 (N.Y. 1891). In *Hamer*, an uncle promised his nephew \$5000 when the latter became twenty-one if he refrained from certain activities (drinking, gambling, etc.). *Id.* at 256. The nephew fulfilled the requirements and asked for payment upon turning twenty-one but agreed that his uncle would hold it for him with interest until he was old enough to use it responsibly. *Id.* The uncle died without paying (or repudiating), and the nephew successfully sued the estate for payment. *Id.* at 256, 259.

This case exemplifies one of two fact patterns characteristic of many cases in which private promises are enforced. In the first category, as in *Hamer*, the defendant is not the promisor; rather, his or her estate is the promisor. In such cases, contract principles are arguably less at stake than trust and estate principles intended to ensure that the deceased's estate is distributed according to his or her intent. In the second category, discussed *infra* note 71, the promisor took active steps to formalize the promise in a way that suggested she intended to override any presumption of nonenforceability.

70. See *infra* notes 86-87 and accompanying text.

71. Some famous cases involving such promises are *Ricketts v. Scothorn*, 77 N.W. 365 (Neb. 1898) and *Greiner v. Greiner*, 293 P. 759 (Kan. 1930). In *Ricketts*, plaintiff, Scothorn, was given a note by her grandfather, Ricketts, for \$2000. 77 N.W. at 365-66. He gave her what appears to have been a formally prepared note at her workplace, in reliance upon which she immediately ceased working. *Id.* at 366. She later resumed work with his consent, but he never repudiated the promise, and all indications were that he intended to keep it. *Id.* However, he died before payment, and his estate refused payment. *Id.* Scothorn prevailed in a classic promissory estoppel case; she was awarded the full value of the note. *Id.* at 367. In *Greiner*, a mother promised her son land if he moved back. 293 P. at 760. He moved and made improvements but she refused to convey land and evicted him one year after he had moved. *Id.* at 759, 761. The court awarded specific performance, deeming monetary damages insufficient. *Id.* at 762. Cf. *Kirksey v. Kirksey*, 8 Ala. 131 (1845) (where plaintiff moved at her brother-in-law's invitation, but after giving her comfortable housing for two years, her brother-in-law removed her to an inferior situation, the court held that "the promise on the part of the defendant, was a mere gratuity, and that an action will not lie for its breach").

These cases are not only dated but fall within the two types of exception noted *supra* note 69. In *Ricketts*, Scothorn sued her grandfather's estate on the basis of a formal promissory note. 77 N.W. at 365-66. In *Greiner*, the mother had already issued a deed for the property she promised to convey, and her promise was part of a larger plan to compensate those children which had been disinherited by their father. 293 P. at 760.

they do not sue when their romantic relationships end or when their friends cancel their social plans—most because it would be bizarre, others because they understand that they would not recover.

Given that promissory estoppel could, in principle, apply in so many private situations but is not applied so widely, the doctrine effectively operates to capture a wider range of economic bargains than an inflexible doctrine of consideration would allow.<sup>72</sup> To the extent the doctrine recognizes noneconomic forms of reliance, or even economic reliance within personal relationships, the arguments here should give us pause and reason to narrow its boundaries. Even where a promisor's abandonment of a promise strikes us as unfair, we should strive to separate the personal wrong she thereby does her promisee from any systematic effects of those wrongs that might justify making contract law available as a means of redress.

### *B. Remedies for Breach of Private Promise*

The more interesting ways in which contract doctrine might make room for private promise involve private promises that we are unwilling to leave unregulated. There are private promises that we as a political community will enforce, not because we seek to give effect to the obligations arising from the personal relationship between the parties (including promissory obligations), but because the relationship and its breach are of social consequence. There are several respects in which the remedies awarded in such cases should deviate from the promisor's obligations under private promissory norms. Most notably, no more than reliance damages should usually be awarded in order to redress the economic injury inflicted. In particular, the state should refrain from coercing conduct that is materially equivalent to performance. Neither party should be indifferent between performance and the available remedy.

Contract law should impose liability in a manner that advances the special public interest in the agreement, but in its specific rules of excuse and remedy, it should deliberately depart from private promissory norms—and by implication, the parties' intentions—in order to make it possible for parties not to comply with moral norms even while meeting their legal obligations. In certain contexts, it is appropriate for courts to interpret the parties' agreement—especially the consequences of breach—in a way that is intentionally inconsistent with those terms contemplated by the parties. This would be an

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72. This is consistent with Farber and Matheson's arguments about the development of promissory estoppel. See *infra* note 102 and accompanying text.

alternative to either majoritarian or penalty defaults.<sup>73</sup> It is also inconsistent with the form of accommodation advocated by Shiffrin.

As Shiffrin has pointed out, promissory norms diverge from contractual ones in a number of respects.<sup>74</sup> A strategy of insisting on the difference between contract and promise would advise in favor of contractual norms that diverge from their promissory counterparts. Several examples follow.

First, moral rules of promise generally require that one perform a promise that is in the parties' combined interests. If circumstances have changed such that both the cost of performance and the promisee's reliance are greater than initially anticipated, but performance is still reasonable, then the promise is binding. By contrast, contract rules appropriately limit promisor's obligations to foreseeable reliance and, especially where the promise was not part of an exchange, courts are likely to be sympathetic to a claim that changed circumstances excuse performance.

Second, promissory norms take into account all aspects of the promisee's interests, including nonmonetary interests that are difficult to quantify reliably. By contrast, contract norms restrict themselves exclusively to the monetary aspects of promise.<sup>75</sup> We might go further, however, and ask judges to conscientiously exclude evidence of emotional injury that is not relevant to the application of contract doctrine. That will make it easier for judges and juries to avoid estimating damages more generously where a legal claim corresponds with a moral one.<sup>76</sup>

Third, as Shiffrin suggests, moral norms may call for punitive reactions.<sup>77</sup> But punitive damages are generally unavailable in contract.<sup>78</sup>

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73. See Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87 (1989) (introducing and distinguishing the concepts of majoritarian and penalty defaults).

74. Shiffrin, *supra* note 3, at 719-727. Perhaps because I am concerned only with those promises that take place within personal relationships, my brief account of the doctrinal divergence between contract and promise differs from Shiffrin's.

75. See RESTATEMENT (SECOND) OF CONTRACTS § 353 (1981) (excluding recovery for emotional disturbance in most cases).

76. One context in which this takes place systematically is divorce. On the approach set forth here, fault may not be relevant for the division of assets upon divorce, given that any enforcement of the marital bargain embodied in alimony and other asset division policies is or should be intended to serve social policies and not actually to enforce the bargain. The only types of fault that may be relevant are ones that resemble torts, such that the moment of asset division is taken as an opportunity to compensate for tort-like conduct that cannot be more effectively remedied elsewhere in the legal system. Cf. Harry D. Krause, *On the Danger of Allowing Marital Fault to Re-Emerge in the Guise of Torts*, 73 NOTRE DAME L. REV. 1355 (1998) (discussing trends in the treatment of fault in divorce law and how it might properly be taken into account in asset division).

77. Shiffrin, *supra* note 3, at 710.

78. See RESTATEMENT (SECOND) OF CONTRACTS § 355 (1981) (excluding punitive damages for breach of contract except where the conduct is also tortious).



Each of these differences helps to express in law the moral difference between contract and private promise. But the two hearts of promise, reliance on the promise and performance of it, are still tainted so long as promisor and/or promisee are given reasons by virtue of contract to behave as they would in the private practice of promise. The legal remedy for breach of private promise should diverge not just from promissory norms but also from the legal remedies available for the ordinary contractual promise.

To reflect the difference between contract and private promise, the remedy for private promise must fall short of the compensatory damages usually offered in contract. I will not attempt here to give a full account of the debate regarding the expectation remedy. Suffice it to say, there are a number of reasons why expectation damages may be preferable as the usual remedy in contract, at least as an alternative to reliance damages (the choice between expectation damages and specific performance is less clear). Expectation damages incentivize promisors to breach if, and only if, their resources are more valued by a third party than by the promisee, thus fostering allocative efficiency.<sup>79</sup> Both in rewarding risk-taking in market transactions and ensuring that resources are deployed by those who can and will pay the most for them, expectation damages facilitate commercial exchange. Perhaps because these reasons for awarding expectation damages are most compelling in a commercial context, there has been a tendency to award expectation damages in commercial contract cases and reliance damages in noncommercial cases.<sup>80</sup> Because private promises are less likely to be bilateral, they are more likely to be litigated under promissory estoppel, and promissory estoppel may often give rise only to reliance damages—at least where it is employed outside of a commercial context.<sup>81</sup>

There is widespread disagreement on what damages are actually awarded under promissory estoppel and whether courts care about reliance or commercial context.<sup>82</sup> Which damages are awarded in a

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79. See Goetz & Scott, *supra* note 55, at 1265.

80. See L.L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages: I*, 46 YALE L.J. 52, 69 (1936). Markovits has argued that the moral norms of promise independently justify the award of expectation damages. See Markovits, *supra* note 2, at 1497-1511. But even if that is the case, the argument here suggests that the legal remedy should be something other than expectation damages.

81. See RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981) (allowing for expectation damages to be limited “as justice requires” and thus affording courts enormous discretion).

82. See Benjamin F. Boyer, *Promissory Estoppel: Requirements and Limitations of the Doctrine*, 98 U. PA. L. REV. 459 (1950) (arguing damages should be limited to reliance); Robert Hillman, *Questioning the “New Consensus” on Promissory Estoppel: An Empirical and Theoretical Study*, 98 COLUM. L. REV. 580, 601 (1998) (courts flexibly award either expectation or reliance damages); Eric M. Holmes, *Restatement of Promissory Estoppel*, 32 WILLAMETTE L. REV. 263 (1996) (showing some but not all jurisdictions limit damages to reliance). But see Daniel A. Farber & John H. Matheson, *Beyond Promissory Estoppel: Contract Law and the “Invisible Handshake,”* 52 U. CHI. L. REV. 903, 905 (1985) (discussed

given case may depend most on whether reliance or expectation is more easily calculated, which in turn will depend in no small part on whether plaintiff or defendant has done a better job marshalling the relevant facts. Nevertheless, the moral separateness of contract and promise offers an independent, affirmative reason, in cases where public policy dictates that some remedy be afforded and it is feasible to award either expectation or reliance damages, to limit damages for breach of private promise to reliance.<sup>83</sup> In commercial contexts, the fact of reliance may render a promise enforceable as such; in these cases, expectation damages recognize that reliance operates as a substitute—if not a marker—for consideration. But where we have reasons to regulate private promise but also have reason, as I argue here, not to enforce those promises, reliance damages acknowledge the public policy interest in protecting certain classes of promisees without rendering the promises enforceable in the manner of a commercial promise.<sup>84</sup>

One example of a situation where reliance damages may be appropriate is upon breach of a promise to marry. Neil Williams has described a trend away from awarding any damages at all, as modern courts have become reluctant to impose contract law, or the “morals of business[,] on personal relationships.”<sup>85</sup> Even judges who did award damages departed from traditional rules of contract, for which such cases gained still further notoriety. But as Williams explains, the prevailing expectation that a bride’s parents will pay for her

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*infra* at note 102 and accompanying text); Michael B. Kelly, *The Phantom Reliance Interest in Contract Damages*, 1992 WIS. L. REV. 1755 (1992); W. David Slawson, *The Role of Reliance in Contract Damages*, 76 CORNELL L. REV. 197, 198-99 (1990) (finding expectation damages are usually awarded); *see also* Mary E. Becker, *Promissory Estoppel Damages*, 16 HOFSTRA L. REV. 131, 151-52 (1987) (rejecting reliance limitation on damages); Edward Yorio & Steve Thel, *The Promissory Basis of Section 90*, 101 YALE L.J. 111 (1991) (same).

83. There may be reasons to lower the damages available upon breach of private promise even below reliance. Legal regulation of personal relationships and the promises to which those relationships give rise should not create barriers to exit. In many cases, reliance damages are not so prohibitively high that the risk of unduly raising the costs of exit offset the interest in redressing the actual injury to the promisee. But in some cases, as where the nonbreaching party is of substantially greater means than the breaching party, damages may need to be further limited to lower exit costs for the breaching party.

84. *Cf.* Yorio & Thel, *supra* note 82, at 113, 161-62. Yorio and Thel argue that expectation damages are normally awarded in promissory estoppel cases and that “the prospect of definite and substantial reliance generally required under Section 90 . . . screens for seriously considered promises” much in the same way that consideration is a proxy for thoughtful promises in a contractual setting. *Id.* at 113. The award of reliance damages for breach of regulated private promises is consistent with their point that the award of only reliance damages would not really render those promises enforceable but “merely to compensate for reliance.” *Id.* at 161. My point is that our aim should be to address the harm that motivates legal treatment without enforcing the promises *per se*. But while I agree that “[w]hat distinguishes enforceable from unenforceable promises is the quality of the commitment made by the promisor,” *id.* at 162, and not the provable fact of inducement, I argue that the relevant characteristic of a promise stems from the nature of the relationship within which it is made, not the seriousness with which it is undertaken.

85. Neil G. Williams, *What To Do When There’s No “I Do”: A Model for Awarding Damages Under Promissory Estoppel*, 70 WASH. L. REV. 1019, 1039 (1995).

wedding, and the fact that wedding costs usually exceed the value of engagement rings, means that courts' refusal to award damages in these cases systematically disadvantages women (who no doubt are disadvantaged when their parents spend large sums to no avail on their behalf).<sup>86</sup> Attending to this injustice while refusing to confuse a promise to marry with a contractual promise argues in favor of a reliance award (as advocated by Williams),<sup>87</sup> which addresses the injury but does not conflate private and legal promise in doing so.

Stephen Smith makes an analogous argument in support of the expectation award in contract cases. He argues that "[b]y limiting itself to awarding compensatory damages (in most cases), the law intrudes to the minimum extent necessary to protect the material interests that the law can, and should, protect, leaving the maximum space possible for the nonmaterial," what he calls "the bond-creation . . . side of contracting[,] to flourish."<sup>88</sup> The logic of his argument is similar to mine, in that both our arguments seek to make it possible for promisors to demonstrate their private reasons for performance and thus preserve a separate moral space for promising outside the law.<sup>89</sup> But Smith applies this logic not just to private promises but to all promises and thus endorses expectation damages as the default contract remedy instead of specific performance. Consistent with prevailing theory, he takes contract to be an instance of promise and thus believes not just private but legal promises too "lead to a special relationship and help to create bonds between the relevant parties."<sup>90</sup>

I have argued that private promise serves this function only inasmuch as it is kept separate and apart from contract. Although Smith appreciates the importance of voluntary promise-keeping, his starting point—namely, his failure to adequately distinguish the character of private and legal promise—does not allow the point to develop to its rightful conclusion: that the performance of private promise should be entirely voluntary.<sup>91</sup> In those cases where the injury or injustice resulting from breach of private promise is too grave to go

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86. *Id.* at 1067.

87. *Id.* at 1047 ("Modern marriages are . . . tantamount to contractual relationships that are terminable at will, and exchanges of promises to marry can be likened to exchanges of promises to enter into at-will employment arrangements. . . . [T]he basis for granting a remedy for the breach of a nuptial promise should not be the aggrieved party's expectancy, but the costs incurred by the aggrieved party in relying on a broken nuptial promise.").

88. Stephen A. Smith, *Performance, Punishment and the Nature of Contractual Obligation*, 60 MOD. L. REV. 360, 363 (1997).

89. *Id.* at 370.

90. *Id.* at 368.

91. Kimel rejects Smith's argument for the same reason. He argues that the bonding function Smith ascribes to contract is off the mark; promise, not contract, serves that function. KIMEL, PROMISE, *supra* note 5, at 98-99.

unaddressed, a more modest remedy than expectation damages is usually adequate.

Reliance damages should be awarded only where special public policy reasons motivate the court's enforcement of promise. In other words, reliance damages are appropriate where promises are enforced in spite of their private status, not because they take place within a rich moral practice of private promise. I do not suggest that it is easy to identify legal rules that leave adequate room for moral norms but also effectively serve those public interests which compel legal regulation in the first place.<sup>92</sup> My point is that allowing moral norms a separate sphere cuts against incorporating them readily into the law, even where we have separate public reasons for enforcing promises. We have not made a categorical choice between reliance and expectation damages in the application of promissory estoppel. In maneuvering within the flexibility that the doctrine allows, we should adopt as among our various purposes the separation of private and legal promise.

### III. FALSE PRIVATE PROMISE AND THE EXPANSION OF CONTRACT

I have claimed that private promise, unlike contract, takes place within personal relationships, and that to the extent possible, legal rules should avoid replicating private promissory norms. The thrust of this argument is that promise-types should correspond to relationship-types. Just as it is morally problematic for contract to govern personal relationships, so too is it problematic for private promise to govern essentially impersonal relationships.

Where personalism is unconstrained by law, it has a tendency to expand to fill in all unclaimed corners of our lives. Historically, this expansion has been accompanied with gross inequities. The most grossly oppressive status relationships—e.g., dictators, feudal lords and slave holders presenting themselves as father figures—might be recognized as ostensibly personal relationships that were the opposite of personal: they failed to properly recognize one party to the re-

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92. While detailed exploration of the issue is outside the scope of this Article, my treatment of private promise suggests that we should systematically distinguish fiduciary relationships recognized for regulatory reasons, such as those imposed on corporate officers and directors, on the one hand, and fiduciary relationships arising from real, personal relationships, on the other. A conflict of interest may give rise to a fiduciary duty as a mechanism by which to regulate the apparent conflict of interest. A personal relationship gives rise to fiduciary duties in order to offset the vulnerability created by a perceived unity of interests. Thus, in the conflict-of-interest cases, it may be appropriate to emphasize process requirements (e.g., disclosures, preapproval, open bidding) and make it difficult to immunize a transaction by attempting to show that it ultimately served the interests of the beneficiary. In the personal relationship cases, we might be more flexible in allowing the fiduciary to show either that she complied with certain process requirements or that the transaction's outcome was favorable to the beneficiary.

lationship as persons bearing the range of interests and rights associated with legal personhood.

The rise of liberalism and the corresponding rise of free markets is well-documented. One important aspect of these related developments has been the rise of free labor markets, in which individuals sell their own labor at market prices. Whatever the disadvantages of such labor markets, few would return to the earlier regime in which workers exchanged their labor for land use or bare subsistence. Those exchanges were mired in complex personalistic relationships in which noneconomic motives were at least outwardly imputed to both employer and employee. We should see it as an achievement of the liberal market economy that labor no longer takes place within the confines of such ostensibly personal relationships.

To the extent we do celebrate that achievement, we should be simultaneously worried by the fact that employment relationships are still only partially situated within the world of contract.<sup>93</sup> In particular, employers continue to make any number of nonlegally binding commitments to employees, and their expectations of employees often also tend to exceed the legal obligations of those employees. For example, “[e]mployers make, and workers rely upon, oral commitments to pay pensions, even though these commitments are often held to be unenforceable under federal pension law.”<sup>94</sup> Employers make prom-

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93. As noted above, Kimel has argued that, “as a facilitator of personal detachment,” contract promotes “freedom from dependence upon the very institution—personal relationship—in the enhancement of which lies the intrinsic value of the practice’s nonlegal equivalent.” KIMEL, PROMISE, *supra* note 5, at 80. But instead of moving from this point to the conclusion that we should use contract to help free certain groups from dependence on personal relationship, who historically have been so dependent, Kimel instead suggests that relational contracts, properly understood, are “hardly contractual” or “relational to the point of not being contractual.” *Id.* at 83. He also suggests that “[t]here is of course nothing wrong in parties deciding to mould and pursue their relations in a way that renders formal contract entirely (or almost entirely) insignificant, and to eschew altogether the option of legal enforceability, alongside any number of other facilities or mechanisms with which the legal system furnishes them as parties to contract.” *Id.*

94. David Charny, *Nonlegal Sanctions in Commercial Relationships*, 104 HARV. L. REV. 373, 377 (1990). Courts appear more open to enforcing promises of pension on which the employee quite obviously relied. Compare *Katz v. Danny Dare, Inc.*, 610 S.W.2d 121 (Mo. Ct. App. 1980), with *Hayes v. Plantations Steel Co.*, 438 A.2d 1091 (R.I. 1982). Katz retired from Dare, whose president was Katz’s brother-in-law, with promise of pension. Dare had threatened to fire Katz if he did not retire, but ultimately Katz retired voluntarily after Dare increased its pension offer. *Katz*, 610 S.W.2d at 123. The *Katz* court held that the promise of pension, affirmed by the Board of Directors’ resolution, was enforceable. *Id.* at 126. Hayes, by contrast, announced his retirement, expecting a pension, and one week before his retirement had a conversation with an officer and stockholder of the company who promised that the company “would take care of” Hayes. *Hayes*, 438 A.2d at 1093. No amounts were specified and no formal provision for a pension was made. *Id.* Hayes would periodically visit and inquire how long the payments could continue. *Id.* They were discontinued upon a takeover of the company. *Id.* The state supreme court reversed the holding of the trial court, holding that Hayes did not rely or exchange consideration for the promise of a pension. *Id.* at 1097. The tenuous case for reliance in *Hayes* may appear to validate the court’s decision, but in fact the two cases are more similar than different. Katz’s real indi-

ises regarding their hiring, firing, and other policies with the clear purpose of either retaining workers or preventing their unionization, even though those promises are accompanied by language that usually renders them unenforceable.<sup>95</sup>

These informal, nonbinding promises are made in other contexts as well—usually in contexts where one party has substantially less bargaining power or less relevant information than the other.<sup>96</sup> Commercial promisors regularly make representations about their products and services which they do not put in writing and have writings which effectively undo the effect of whatever oral representations or promises were made.

The extralegal status of these promises is in tension with the arm's length nature of the relationships within which they are made. True private promises cause private promisors to give equal or greater weight to the relevant interests of their promisees. False private promises do no such thing. In fact, they deprive promisees of even the benefits of contract, the only kind of commitment normally attainable in an arm's length relationship. We saw earlier that while the obligations of private promise were in some sense more extensive than those of contractual promise, the private promisor is entitled to exercise greater judgment as to what conduct best serves the joint ends of the promisor and promisee. By contrast, a contractual promisor's rel-

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vidual reliance on the pension promise was limited since he could have been terminated in any event. The true grounds for enforcing the promise is that Dare was able to lose Katz without having to terminate him, which may have set a poor signal to other employees after Katz's long service, especially since Katz had become a burdensome employee only after sustaining an injury while in service to Dare. A similar benefit was likely achieved by Plantation Steel when it promised Hayes a pension. Because employment relationships are not personal ones, even when good will appears to motivate an employer's promise, the promise should be enforced in light of the multiple interests affected by what transpires within those relationships.

95. See William B. Gould IV, *The Idea of the Job as Property in Contemporary America: The Legal and Collective Bargaining Framework*, 1986 BYU L. REV. 885, 903 (1986) (citing cases).

96. The fact that false private promises are usually made in the context of disparate bargaining power is of not only moral but also economic relevance. Avery Katz has shown that "the efficiency of promissory estoppel in preliminary negotiations depends in large part on which party holds the bulk of the bargaining power *ex post*." Avery Katz, *When Should an Offer Stick? The Economics of Promissory Estoppel in Preliminary Negotiations*, 105 YALE L.J. 1249, 1256-57 (1996). Because the party with bargaining power will reap the benefits of optimal reliance, she should be held to any offer she makes to the weaker party so that she makes only those offers which will induce optimal reliance. *Id.* at 1257. Katz observes that "[t]he strongest case for applying promissory estoppel to precontractual negotiations may be in the context of labor contracts . . . . Except when the employee has some unique skill or professional knowledge, the employer is much more likely to hold the bargaining power." *Id.* at 1301-02. While Katz makes this point in the context of preliminary negotiations, it applies to other promises made by employers to employees where the employer, by varying the content of its promise and the scope of information extended to its employees, controls the degree to which employees rely on its promises and can expect to reap the rewards of that reliance.

actively narrow obligations are more constrained and not subject to easy revision based on change of circumstance. A false private promise entails the worst of both worlds for the promisee: the priority of the promisor's interests and flexibility as to the conditions and terms of performance.

What I refer to as false private promises are normally made within hierarchical relationships in which the stronger party seeks a benefit from the promisee and can secure that benefit now through a nonbinding promise of future performance. While we might be able to conceptualize the value of a false private promise along a continuum that includes binding promises, this discussion is intended to show why in fact there is something especially insidious about false private promises. That is, one might be tempted to equate a binding promise (90% probability of performance) of \$100 with a nonbinding promise (45% probability of performance) of \$200. But the false private promise of \$200 is not just worth less because of a lower probability of performance. It is morally repugnant from a political point of view because, by incorrectly recognizing the false private promise as a private promise, the law treats the parties as though they are in a personal relationship when they are not. In doing so it denigrates relationships in which interests are genuinely unified and unwittingly celebrates hierarchical ones in which one party's interests are systematically discounted. In confusing hierarchy for its opposite, the law mistakes conditions of moral oppression for conditions of moral flourishing. Even if contract law is not the domain in which those morally oppressive conditions are most effectively attacked, contract law is at least one site in which the law may refuse to give effect to a symptom of that oppression. Refusing to enforce false private promises may simply result in binding promises of performance that are of lower face value. But even if bringing downward promises into the fold of contract does not make them more economically valuable to promisees, it has the noninstrumental virtue of taking them for what they are.

There is another related argument for enforcing false private promise, i.e., recognizing them as contractual. Enforcing these promises may serve the public interest, including distributive justice.<sup>97</sup> Where enforcement of a promise interferes with private promise and undermines the value of a personal relationship, there is a competing reason not to enforce that promise. Here, the opposite is true; we have independent reasons (discussed above) for treating false private promises as contractual. But even if one does not recognize the non-

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97. These two arguments for making false private promise more difficult are in some ways similar to two-pronged attacks on inequality. False private promise is wrong in itself and also detrimentally impacts distributive justice. Excessive economic inequality is wrong in itself and also detracts from other political moral goods, such as a democratic culture and political equality.

instrumental reasons for calling out false private promises as false, so long as one recognizes independent instrumental reasons for enforcing these promises, there is a valuable lesson to be learned from the difference between private promise and contract. We can avoid the mistake of *refraining* from regulating these ostensibly private relationships on the grounds that the promises were not intended to be binding. For the reasons discussed in Part I, the nature of the relationship within which a promise is made, and not just the intention of the promisor, is important in setting the default interpretive rules as to enforceability. The intentions of the parties are also important, and so we would not want to prohibit this unsavory class of promise altogether. But the argument presented here gives us reason to make it more difficult to make a false private promise.<sup>98</sup>

We should not treat as dispositive even our best guess as to whether the parties intended a promise to be legally binding because often the parties' intentions are not consistent, and to defer to the party who fails to form an intention to be bound is likely to systematically disadvantage certain parties.<sup>99</sup> The problem is not solved, though it is helped, by referring only to reasonably inferred intentions. It is appropriate to ask whether a party spoke and acted in a way that made it reasonable for the other party to believe that she intended to be bound. But the inquiry cannot end there. Realistically, it is not reasonable to believe that an employer who makes certain formal commitments and explicitly makes others in a separate form intends both to have the same status. The legal standard for the reasonableness of the inference that the promise was intended to be binding should turn not just on the likely intentions of the promisor or even the promisee's probable perception of those intentions but on how difficult we want it to be for a party to have his cake and eat it too, i.e., how difficult we want it to be for a party to make a promise but avoid its legal enforceability.<sup>100</sup> In certain contexts (personal relationships) we should make it very, very easy—it should be difficult to

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98. Notably, the argument here is not that enforcing ostensibly nonbinding promises by employers to employees is necessary to sustain the relationship that exists between them. The idea is precisely the opposite: enforcing these otherwise false private promises is necessary to upset the insidious aspects of private ordering between unequals. There may be order without law, but there is no justice.

99. Cf. Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269 (1986) (advocating reliance on evidence of parties' intentions as to legality to decide whether agreements are legally binding).

100. Randy Barnett and Mary Baker ask, "How can enforcement turn on the reasonableness of reliance when the reasonableness of reliance will necessarily depend on enforceability?" Randy E. Barnett & Mary E. Becker, *Beyond Reliance: Promissory Estoppel, Contract Formalities, and Misrepresentations*, 15 HOFSTRA L. REV. 443, 446-47 (1987). In reforming the scope of enforceable promises, the reasonableness of reliance should depend on the context in which it was made, i.e., whether promises made in the context of the kind of relationship at hand should usually be enforceable.



make one's promise binding.<sup>101</sup> In other contexts, as in the employment context, it should be very, very hard—it should be very difficult to make a private promise to an employee because those promises are usually not embedded in a genuine personal relationship characterized by unified interests.

This approach is consistent with others' recommendations and observations. Farber and Matheson have suggested that the new rule of promissory estoppel is that "any promise made in furtherance of an economic activity is enforceable."<sup>102</sup> The doctrine would go a long way toward eliminating false private promises in the employment context. Indeed, in support of their interpretation of the doctrine, most of their examples are promises by employers to employees.

Farber and Matheson emphasize that employment relations take place over a period of time and that it is therefore difficult to transcribe the bargain in a traditional contract.<sup>103</sup> Those kinds of long-term contracts are called relational, and of course it is true that long-term dealings produce a kind of relationship. But it is misleading to call these contracts relational, because it suggests that it is the fact of the relationship that makes them special. But the reality is that long-term dealings between hierarchically situated parties do not normally result in anything importantly like a close personal relationship.<sup>104</sup>

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101. This is generally consistent with the rule advanced by Randy Barnett, albeit on other grounds. See Randy E. Barnett, *The Death of Reliance*, 46 J. LEGAL EDUC. 518 (1996). He suggests the following restatement of the rule governing enforceability of non-commercial promises:

(1) A promise not made in furtherance of an economic activity is binding if the promise is in writing that is signed by the promisor and either (a) is under seal, or (b) recites a nominal consideration, or (c) contains an expression of intention to be legally bound, or (d) is also signed at the same time by the promisee. (2) A promise not made in furtherance of an economic activity that fails to meet the requirements of (1) is not ordinarily binding.

*Id.* at 532.

102. Farber & Matheson, *supra* note 82, at 905; see also Eisenberg, *supra* note 29, at 832-33 ("Under modern contract law, there is a marked trend to make all commercial promises enforceable, even if they are not bargain promises. Partly this is because many commercial promises that do not appear to be bargains turn out to have a bargain element when properly analyzed."). The doctrine of waiver could also be tailored to employment in order to combat false private promising.

That promises made in an economic context are usually made for some reciprocal benefit does not imply that all such promises should be enforced. Not all agreements must be enforced. Enforcing certain agreements is a political decision based on public policy. The point is that neither the absence of intention to be legally bound nor the fact that the promise was not one side of an explicit bargain should be treated as a dispositive reason not to enforce the promise.

103. Farber & Matheson, *supra* note 82, at 925.

104. Of course, this is a generalization. But I would argue that, outside of families, hierarchy impedes the development of a genuine personal relationship in which the parties routinely and voluntarily give the other's interests weight comparable to, let alone greater than, their own. Employer and employee may share certain interests, such as the success

While so-called relational contracts are importantly different from one-off contracts and present contract law with distinct challenges, those challenges are not like the challenges presented by contracts between parties who really are in a personal relationship. Indeed, the greatest challenge posed by so-called relational contracts is precisely to avoid having them function as though they were personal relationships.

Courts seem to be moving in the direction of enforcing promises by employers that would earlier have been nonbinding. In some cases, courts merely reject an employer's formally manifest intention in favor of workers' reasonable inferences about the terms of his employment from the employer's statements or behavior. These courts have found "enforceable commitments in 'personnel policies or practices of the employer, the employee's longevity of service, actions or communications by the employer reflecting assurances of continued employment, and the practices of the industry in which the employee is engaged.'" <sup>105</sup> But in some cases courts have gone further to hold, as the above approach would suggest, "that neither the employee's nor the employer's subjective intent determines whether commitments in handbooks are enforceable. These courts sweep away the evidentiary and conceptual difficulties of showing intent by presuming that the worker has relied upon the commitment and by then equating reliance with bargain." <sup>106</sup>

In a welcome development, some courts have enforced promises made even to prospective employees. In particular, numerous courts have held that a promise of employment, on which an employee relies, may give rise to damages, should the employee be disinvented before beginning work. <sup>107</sup> These cases recognize that employers intend

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of the firm or the well-being of a client, but this is best regarded as an overlap between otherwise distinct interest sets.

105. Charny, *supra* note 94, at 380-81 (citing numerous cases).

106. *Id.* at 381. Charny argues that workers would not be put so much at the mercy of employers if employers' powers were effectively constrained outside the law through reputational interests, fear of employees quitting when treated unfairly, and through social or psychic losses associated with inequity. *Id.* at 396-97. But Charny's own later discussion reveals the problems with those constraints.

Promissory estoppel, with its apparent emphasis on reliance, is more generally the doctrinal mechanism by which employer promises are most easily enforced. "Originally seen as particularly suited for use in noncommercial settings, such as situations involving intra-family promises and charitable subscriptions, its application was eventually extended—over some strong objections—into commercial settings as well." Knapp, *supra* note 69, at 1198. As Farber, Matheson and others have argued (and I argue now, on other grounds), it is better suited to its new territory.

107. See, e.g., *Hunter v. Hayes*, 533 P.2d 952, 953 (Colo. Ct. App. 1975); *Grouse v. Group Health Plan, Inc.*, 306 N.W.2d 114, 116 (Minn. 1981); *Goff-Hamel v. Obstetricians & Gynecologists, P.C.*, 588 N.W.2d 798 (Neb. 1999) (discussing numerous cases in which perspective employees recovered through promissory estoppel). In *Grouse*, Group Health Plan offered Grouse a position as pharmacist. 306 N.W.2d at 115. Grouse accepted and informed Group Health that he would need to give his present employer two weeks notice. *Id.* Group Health confirmed that Grouse had in fact quit. *Id.* In the meantime, Grouse declined an-

prospective employees to quit their previous positions and take other steps in order to make themselves available for employment; those steps operate to employers' benefit. The fact that they usually take place outside of any formal contractual relationship and are usually expected to lead only to an at-will employment relationship does not justify treating the promise as a casual or informal one, which the law will not recognize.

The slow and ongoing depersonalization of the employment relationship throws American labor law into positive relief. One of its important achievements has been that it not only collectivizes workers and thereby increases their bargaining power and ability to monitor their employers, but also encourages the union to adopt a wholly institutional role vis-à-vis employers. The National Labor Relations Act institutes rules of bargaining that regulate employers' speech more strictly than where employers speak to employees directly outside of a union context (or at least, outside of a union context, any regulations on employers' speech are unlikely to be sanctioned). This makes false private promise less likely, as employers are not permitted to make many of the generic threats and promises which they might normally make in order to appease workers contemplating unionization or labor unrest.<sup>108</sup> Moreover, while there is controversy over whether unions should be limited to the wholly adversarial role which they are required to assume under current labor law, my argument illuminates some subtle benefits of the adversarial nature of collective bargaining in the United States. The adversarial system makes it easier to call out paternalistic rhetoric and to monitor and demand performance of employer claims. It also makes it more diffi-

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other offer. Group Health hired someone else because it did not obtain a reference for Grouse. *Id.* The court awarded reliance damages: "The conclusion we reach does not imply that an employer will be liable whenever he discharges an employee whose term of employment is at will. What we do hold is that under the facts of this case the appellant had a right to assume he would be given a good faith opportunity to perform his duties to the satisfaction of respondent once he was on the job." *Id.* at 116.

Damages in these cases are limited to reliance, which may be appropriate since, unlike in the other employer-employee situations discussed here, the employee has not conferred a direct benefit on the employer through her work. While it strikes some as anomalous that the employee would be compensated even for reliance interests prior to employment, the marginal degree of reliance is often greatest immediately prior to beginning employment, since the worker normally has to leave her previous position and make other major accommodations to make it feasible to begin employment (e.g., move). As the court in *Grouse* held, in principle, promises of employment may give rise to damages even within an existing employment relationship. *Id.*

108. See *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969) (holding that "an employer is free to communicate to his employees any of his general views . . . so long as the communications do not contain a 'threat of reprisal or force or promise of benefit'"); see also *Spring Indus., Inc.*, 332 N.L.R.B. 40 (2000) (affirming recommendation that election results be set aside where employer threatened that plan would close if unionized); *Dal-Tex Optical Co.*, 137 N.L.R.B. 1782, 1786-87 (1962) (holding employer violated Section 8(a)(1) of the NLRA by making threats and promising certain benefits).

cult to co-opt workers' representatives in personalistic relationships with those with whom they are supposed to bargain. The interests of workers and their employers overlap but are not aligned, and the arm's length bargaining promoted by the NLRA regime allows this truth to frame negotiation of the employment relationship and behavior within it.

#### IV. CONCLUSION

The current relationship between contract and promise in legal theory does not reflect the triumph of liberalism in our political culture. Notwithstanding valuable insights into the challenges inherent in any attempt to demarcate public from private, our political culture is committed to recognizing some boundaries. Contract law should be enlisted in the effort to ensure that various practices end up on the appropriate side of the line.

My primary aim in this Article has been to detail the tension between contract and private promise and to argue that contract is not an instance of promise as we commonly understand the practice of promising. Private promise and contract are both sites for moral agency, and both practices have moral value. But the value of the former lies in our capacity to cultivate personal relationships that redefine the good we each pursue. By contrast, contract is a valuable site for the exercise of public virtue where we can pursue our own ends effectively only to the extent disinterested others can be persuaded to do and give up things useful to us, which in turn requires us to take their (still separate) interests into account.

Once we have disentangled private and legal promise, we can begin to adjust the boundaries and defaults of contract law accordingly. Because private promises are private, the law should make it relatively costly for parties to bring the law to bear on such commitments. When public policy dictates affording a legal remedy for their breach, the remedy should deviate from both the obligations imposed by private promissory norms and the remedy usually awarded in commercial cases. In particular, reliance damages will more often be appropriate in promissory estoppel cases outside of economic relationships.

Because employment relationships are not personal relationships, promises made by employers to employees should be legally binding in the usual case. Just as parties should have to go out of their way to make a private promise legally binding, legal defaults should make it relatively onerous for employers to avoid legal consequence when they make promises to their employees. While many balk at the liberal agenda when it comes to limiting state intervention in the private sphere, on the eradication of the vestiges of pseudo-personalism in the labor market, there may be more agreement.